The Central Law Journal.

ST. LOUIS, FEBRUARY 21, 1890.

THE public press of Colorado will doubtless go slow hereafter in the matter of criticising and abusing its courts of justice, and attempting by sensational articles, to prejudice the result of pending causes. And it will be matter of sincere congratulation if the recent decision of Cooper v. People by the Supreme Court of that State should have a widespread influence throughout the country. Newspapers, in some localities, at least, seem to have brought themselves to the belief in their absolute immunity from responsibility in criticising and reviewing the work of courts, and it is just as well that they should have an occasional reminder of the ample power of the law to protect its officers from malicious libels, published with intent to influence the work of the courts. In the Colorado case an editor, whose idea of the liberty of the press seems to have been an outgrowth of his unrestricted western life, and who doubtless considered that he had as much right to pitch into the court as to breathe the free air of that region, was cited for contempt in the publication of a series of articles, in a newspaper of general circulation in the place where the court was being held, charging perjury, bribery, corruption and the like against the parties concerned and those engaged in conducting the trial of a cause then pending. The bold editor thereupon, as is the usual practice of men who have done something they ought not to have done, firmly planted himself upon the constitution of the State, which, like most instruments of that kind, contains a clause guaranteeing freedom of speech and of written publications, contending that he had a right to say what he pleased, outside the presence of the court, which had no power to punish as for contempt committed in its presence. But the court looked at the matter differently, and sent the editor to jail, where it was thought that time and a closer study of the constitution for which he had manifested such reverence, would convince him of his mistake and bring him to a full realization of that which was once said of his own profession, "There is no use throwing mud at a man who owns a mud machine."

THE Supreme Court, in affirming the decision of the lower one, undoubtedly assumed the correct position in declaring that, while every citizen may fully and freely criticise all decisions rendered, and by legitimate argument establish their soundness or unsoundness and comment on the fidelity or infidelity with which judicial officers discharge their duties, yet the right to attempt, by wanton defamation, to prejudice the rights of litigants in a pending cause, degrade the tribunal, and impede, embarrass or corrupt that administration of justice which is so essential to good government, cannot be sanctioned. Neither, as was held by the court, does the right of trial by jury extend to cases of contempt. The power to punish summarily, in such cases, is essential to the very existence of a court. The contrary rule would place it in the power of a vicious person to so conduct himself as to prevent any kind of a trial. This view is in harmony with all the leading authorities from Blackstone down, and has the support of all the courts of this country which have passed upon the question, with the exception of Illinois, which, in Storey v. People, held the defendant in such case entitled to a trial by jury. The recent case of Myers v. State, decided by the Ohio Supreme Court, which we published in full with an exhaustive note (29 Cent. L. J. 310), is in line with, and may be read with interest in connection with, the Colorado decision.

THE doctrine that one must so use his own property as not to cause injury to others, was carried to what seems almost an absurd conclusion in the recent English case of Reinhardt v. Mentasti. There the defendants had recently rebuilt and enlarged a hotel, and their back premises were separated from the plaintiff's house by only a party wall. In rebuilding, the defendants had placed a closed range or stove in a supplemental kitchen in the basement, and had constructed an air-shaft to carry off the heated air. This kitchen was used for supplying the hotel with hot water and for

cooking pastry; it was separated from the plaintiff's wine cellar only by the party wall; and in consequence of the use of the kitchen by the defendants the plaintiff's wine cellar was rendered quite unfit for ordinary use. The plaintiff asked for an injunction to prevent the stove being so used as to cause a nuisance and injury to him. The defendants pleaded that the stove was six inches from the party-wall, which they had covered with asbestos; that they had only used this kitchen in the ordinary way for residential purposes as a family hotel; and that, if the plaintiff suffered any inconvenience, it was one of the necessary incidents of life in a great city and did not entitle him to prevent the defendants from using their premises in a reasonable and ordinary way. The court, which at the outset confessed to some fluctuations of opinions in the consideration of the case, finally granted the injunction, stating that notwithstanding some passages in some judgments to the contrary, the application of the principle governing the jurisdiction of the court in cases of nuisances does not depend on the question whether the defendant is using his own reasonably or otherwise. "The real question," he says, "is does he injure his neighbor?"

We are questioning in our mind whether the court isn't still "fluctuating" on that decision.

NOTES OF RECENT DECISIONS.

An excellent example of an unconscionable contract, and for that reason not enforceable, is found in Hume v. United States, 10 S. C. Rep. 134, decided by the United States Supreme Court. There, plaintiff made a contract to furnish the government with many articles at stipulated prices, among which was "shucks" at sixty cents per pound, when the fact appeared that "shucks" were worth less than two cents per pound, and that the error occurred by failing to strike out the word "pounds" on the printed form on which plaintiff's proposal was made and to insert the word "hundredweight" instead. Chief Justice Fuller, in the course of an exhaustive opinion affirming that of the Court of Claims, and holding that in suits upon unconscionable agreements the courts of law will take the matter into their own control and protect the parties, even after part performance, says:

In his celebrated judgment in Earl of Chesterfield v. Sanssen, 2 Ves. Sr. 125, 155, Lord Hardwick arranged all the forms of fraud, recognized by equity, in four classes, the first two of which he gives in these words: (1) Then fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case. (2) It may apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientions bargains; and of such even the common law has taken notice; for which, if it would not look a little ludicrous, might be cited James v. Morgan, 1 Lev. 111." The case referred to by the Lord Chancellor was ruled by Sir Robert Hyde, then at the head of the king's bench, and is reported in 1 Lev. 111, in these words: "*Assumpsit* to pay for a horse a barley-corn a nail; doubling it every nail; and avers that there were thirty-two nails in the shoes of the horse, which, being doubled every nail, nail came to five hundred quarters of barley. And on *non assumpsit* pleaded, the cause being tried before Hyde at Hereford, he directed the jury to give the value of the horse in damages, being £8, and so they did. And it was afterwards moved in arrest of judgment for a small fault in the declaration, which was overruled, and judgment given for the plaintiff." James v. Morgan is cited by Lord Chief Justice Hale (Anon. 1 Vent. 267, note) to the point that "upon certain contracts the jury may give less damages than the debt amounts to;" and also in Bacon's Abridgment ("Damages," D. 1), together with Thornborough v. Whitacre 6 Mod. 305, 2 Ld. Raym. 1164, to to the same point, stated thus: "Though in contracts the very sum specified and agreed on is usually given, yet if there are any circumstances of hardship, fraud, or deceit, though not sufficient to invalidate the contract, the jury may consider of them, and proportion and mitigate the damages accordingly." In Thornborough v. Whitacre the plaintiff declared that the defendant, in consideration of 2s. 6d. paid down, and £4 17s 6d to be paid on the performance of the agreement, promised to give the plaintiff two grains of rye corn on a certain Monday, and to double it successively on every Monday for a year, and the defendant demurred to the declaration. Upon calculation, it was found that, supposing the contract to have been performed, the whole quantity of rye to be delivered would be 524,288,000 quarters. The court recognized the case of James v. Morgan as good law, and said that though the contract was a foolish one, the defendants ought to pay something for his folly. "The counsel for the defendant, perceiving the opinion of the court to be against his client, offered the plaintiff his half crown and his cost which was accepted of, and so no judgment was given in the case." In Leland v. Stone, 10 Mass. 459, James v. Morgan and Thornborough v. Whitacre are referred to with approbation, and the principle of mitigating the damages applied, as also in Cutler v. How, 8 Mass. 257; Cutler v. Johnson, *Id.* 266; and Baxter v. Wales, 12 Mass. 365. And see Greer v. Tweed, 13 Abb. Pr. (N. S.) 427, and Russell v. Roberts, 3 E. D. Smith, 418. Mr. Justice Swayne remarks in Scott v. U. S., 12 Wall. 443-445: "Where parties intend to contract by parol,

and there is a misunderstanding as to the terms, neither is bound, because their minds have not met. Where there is a written contract, and a like misunderstanding is developed, a court of equity will refuse to execute it. If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to. James v. Morgan, 1 Lev. 111; Thornborough v. Whitacre, 2 Ld. 1164; Baxter v. Wales, 12 Mass. 364" But James v. Morgan and Thornborough v. Whitacre were plainly cases in which one party took advantage of the other's ignorance of arithmetic to impose upon him, and the fraud was apparent upon the face of the contracts. In the latter case the defendant, by demurring, admitted that there was no fraud; and consequently the only question was on the validity of the contract in the absence of fraud, and it was sustained, but the plaintiff was allowed to take nominal damages only. And as to many of the cases it may be objected that they are at varience with the rule that a party must recover according to his contract if he sue upon it, or not at all, although, if the express contract were void, the defendant might nevertheless he held in general *assumpsit*, upon the implied contract to pay for property received from the plaintiff and retained.

The true principle deducible from the authorities, and most consistent with the reason of the thing, seems to be this: In the instance of a special contract which has been wholly executed, and the time of payment passed, if the plaintiff proceeds in general *assumpsit* the express contract is only evidence of the value of the consideration, which is open to attack by the defendant in reduction of damages. But, where the action is in special *assumpsit*, the express promise of the defendant fixes the measure of damages to which the plaintiff is entitled. And while the general rule is that the performance of every contract may be resisted on the ground of fraud, at law as well as in equity, yet upon a contract of sale the defendant, having accepted performance, cannot interpose this defense to defeat the contract, unless he returns the article, or proves it to have been entirely worthless, though he may ordinarily recoup the damages which he can show he has sustained through the fraud. And there may be contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception or at least to require but slight additional evidence to justify such presumption. In such cases the natural and irresistible inference of fraud is as efficacious to maintain the defense at law as to sustain an application for affirmative relief in equity. When this is so, if performance has been accepted in ignorance and under circumstances excusing the non-return of articles furnished, and these have some value, the amount sued for may be reduced to that value. In the case at bar the shucks had been appropriated by the government before the discovery of the error in the schedule, and the position of the claimant in regard to it, and, if the defendant successfully impeached the contract on the ground of fraud, the judgment for the actual market value of the shucks was correct, and sustainable under the pleadings. In order to guard the public against losses and injuries arising from the fraud or mistake or rashness or indiscretion of their agents, the rule requires of all persons dealing with public officers the duty of inquiry as to their power and authority to bind the government; and persons so dealing must necessarily be held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principal. Whiteside v. U. S. 93 U. S. 247, 257; U. S. v. Barlow, 10 S. C. Rep. 77. If the claimant intended to induce the agents of the government to contract to pay for these shucks 35 times their highest market value, and the value, and the agents of the government knowingly entered into such a contract, it will not be denied that such conduct would be fraudulent and the agreement vitiated accordingly. If the claimant knew that a clerical error had been committed, of which the agents of the government were ignorant, and deliberately intended to take advantage of the error to obtain the execution of a contract for the payment of so grossly unconscionable a price, or if the facts were such that he must be held to have known that their action, if understandingly taken, would be in palpable dereliction of their duty to their principal, and, notwithstanding, sought to profit by it, the character of the fraud, so far as the claimant is concerned, is not changed by the fact that such action was the result of the negligence or mistake of the government's agents, untainted by moral turpitude on their part.

THE extra-territorial jurisdiction of receivers was considered by the Supreme Court of California, in Humphreys v. Hopkins, 22 Pac. Rep. 892. There, it was held upon rehearing that receivers, appointed by an order which does not vest the title to the property in them, but merely directs them to take possession of and preserve it, cannot, when they have sent it into a foreign jurisdiction, reclaim it as against a sheriff who has seized it on attachment at the suit of citizens of the foreign jurisdiction to enforce their demands against the owners of the property. The court justified its conclusion by the decision of Mr. Justice Wayne, in Booth v. Clark, 17 How. 334, and the note to Allen v. Caspar, 6 Am. St. Rep. 185, in which Mr. Freeman collects the authorities and deduces therefrom that a foreign receiver has no right to sue in another State, but that on the ground of comity the court will, in a just and proper exercise of a sound legal discretion, permit such suits to be maintained for the purpose of thereby doing justice, where the good of a large number would demand it, by recognizing the orders and judgments of the courts of a sister State; but that in none of the cases is such right to sue conceded or the suit permitted to be maintained by the foreign receiver, where the claim sought to be enforced conflicts with the rights of citizens or creditors in the State where the suit is brought. Thornton and McFarland, JJ., dissent from the conclusion of the court in a vigorous opinion, which seems to us to be of

sufficient interest to give in full. Thornton, J., says:

It is argued that the plaintiffs, suing as receivers, cannot maintain this action, inasmuch as a receiver cannot maintain an action out of the jurisdiction of the court which appointed him. It may be conceded that this is the general rule, and still the plaintiffs can maintain this action. The right to sue and maintain the action is founded on the possession of the car, delivered to the plaintiffs as receivers by the railroad company, in May, 1884, at Toledo, Ohio, and its being taken from that place by plaintiffs in the course of their management, carrying on, and control of the business of the company, to St. Louis, where it was loaded and sent to the city of San Francisco. This possession was given by the owner of the car, the railroad company, in pursuance of the order of the court, and was never afterwards disturbed by the company. The possession of the car remained in the receivers, unchanged and never interfered with, until it was attached in this State, on the 1st of April 1885. The plaintiffs, under the undisputed authority of the court making the appointment, and without challenge by the railroad company, were, during the period of this possession, using this car in carrying on the business of the railroad company. The taking possession of the car by the plaintiffs, as receivers, was lawful, and their continued possession was also lawful, and such possession vested in them as individuals a special property, on which title they can as individuals maintain this action. This conclusion is supported both on principle and by authority.

The case of Railway Co. v. Packet Co., 108 Ill. 317, is directly in point. There the contest was between a receiver of the property and effects of the Northern Line Packet Company, regularly appointed by the circuit court of St. Louis, Mo., in an action brought against that company, and an attaching creditor on a writ brought in the circuit court of Adams county, State of Missouri. The court held that the title of the receiver was good against the attaching creditor in the State of Missouri, and judgment was accordingly rendered in favor of the receiver. The court, speaking to the point, said: "The general doctrine that the powers of a receiver are co-extensive only with the jurisdiction of the court making the appointment, and particularly that a foreign receiver should not be permitted, as against the claims of creditors resident in another State, to remove from such State the assets of the debtor, it being the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied, we fully concede; and were this the case of property situate in this State, never having been within the jurisdiction of the court that appointed the receiver, and never having been in the possession of the receiver, it would be covered by the above principles, which would be decisive against the claim of the appellee. But the facts that the property at the time of the appointment of the receiver was within the jurisdiction of the court making the appointment, and was there taken into the actual possession of the receiver, and continued in his possession until it was attached, take the case, as we conceive, out of the range of the foregoing principles. We are of opinion that, by the receiver's taking possetsion of the barge in question within the jurisdiction of the court that appointed him, he became vested with a special property in the barge, like that which a sheriff acquires by the seizure of goods in execution, and that he was entitled to protect this special property while it continued, by action, in like manner as if he had been the absolute owner. Having taken the property in his possession, he was responsible for it to the court that appointed him, and had given a bond in a large sum to cover his responsibility as receiver, and to meet such liability he might maintain any appropriate proceeding to regain possession of the barge which had been taken from him. Boyle v. Townes, 9 Leigh, 158; Singerly v. Fox, 75 Pa. St. 114. It is well settled that a sheriff does, by the seizure of goods in execution, acquire a special property in them, and that he may maintain trespass, trover, or replevin for them." The court concludes its observations on this point as follows:

"By taking the barge into his possession within the jurisdiction of the court that appointed him, a special property in the barge became vested in the receiver; and it is the established rule that, where a legal title to personal property has once passed and become vested in accordance with the law of the State where it is situated, the validity of such title will be recognized everywhere." Citing Cammell v. Sewell, 5 Hurl. & N. 728; Clark v. Peat Co., 35 Conn. 303; Taylor v. Boardman, 25 Vt. 581; Crapo v. Kelly, 16 Wall. 610; Waters v. Barton, 1 Cold. 450. Cagill v. Wooldridge, 8 Baxt. 580, is to the same effect. In that case the contest was also between the receiver and an attaching creditor. The case was ruled in favor of the receiver.

A receiver of an important manufacturing company, appointed by a court of New Jersey, who took possession of its assets for the purpose of completing a bridge which the corporation had contracted to build in Connecticut, purchased iron with the funds of the estate, and sent it into that State, and it was held that the iron was not open to attachment in Connecticut by a creditor residing there. Pond v. Cooke, 45 Conn. 126.

In McAlpin v. Jones, 10 La. Ann. 552, and in Hurd v. City of Elizabeth, 41 N. J. Law, 1, receivers were allowed to maintain actions without the jurisdiction of the court appointing them. In the case cited from 10 La. Ann. the receiver had been appointed by a chancery court in Mississippi. He there took possession of the property, under the order of the appointment. A portion of the property, viz., four slaves, were stolen from the possession of the receiver, and came into the State of Louisiana. The owner brought suit in the latter State, and its highest court adjudged that he could recover. It may be observed that the property sued for in this case was in the possession of the receivers, within the jurisdiction of the court appointing them. The receivers got their possession in Ohio by delivery from the owner, and took the car to St. Louis, where it was within the jurisdiction of the circuit court of the United States for the eastern district of Missouri. The fact that they got possession of the car out of the jurisdiction of the appointing court cannot make any material difference, when the property was at once carried into such jurisdiction, and therein retained in their possession. That it cannot affect the right of plaintiff to recover that the car was afterwards sent by the receivers in the course of their duty, and in the prosecution of the business which they were appointed to carry on, see Railroad Co. v. Packet Co., 108 Ill. 323, 324.

In the same line of decision with the foregoing are Low v. Burrows, 12 Cal. 188, and Lewis v. Adams, 70 Cal. 403, 11 Pac. Rep. 833. In Low v. Burrows the action was brought by the assignee of a judgment recovered in New York. The assignment was made by an administrator in New York. It was contended that

the administrator in New York had no right to assign the judgment, the debtor residing at that time beyond the State of New York. This contention was based on the ground that the authority of the administrator did not extend beyond the State in which the letters were granted. The court disposed of this contention adversely to counsel presenting it, and it was held that the administrator, having recovered the judgment, owned it, and could assign it. In Lewis v. Adams, *supra*, the action was brought on a judgment recovered by the plaintiff, as the executor of the last will of one Nat Lewis against the defendant, P. T. Adams, in the district court for the county of Bexar, State of Texas. In the complaint in this suit the plaintiff described herself as executrix of Lewis, and it was contended that she having been appointed executrix by a Texas court, her authority was confined to the State of Texas, and that she could not maintain any action in this State. It was held that the judgment recovered in Texas vested the title in her; that she was accountable to the court in Texas from which she received her appointment; and that she could maintain the action here on her own title as an individual. The whole subject is ably and fully discussed, and the authorities cited, in the opinion of Justice McKinstry. See 70 Cal. 406, 407, 11 Pac. Rep. 833.

In the same line of decisions is Wilkinson v. Culver, 25 Fed. Rep. 639, where a judgment was recovered by a receiver of a corporation appointed by a New Jersey court, and the receiver, as owner of the judgment in his individual capacity, was allowed to recover on it in an action brought in the United States circuit court for the southern district of New York. See, also, Biddle v. Wilkins, 1 Pet. 686, and Talmage v. Chappel, 16 Mass. 71; Trecothick v. Austin, 4 Mason, 34, 35; Barton v. Higgins, 41 Md. 539; Cherry v. Speight, 28 Tex. 503; Rucks v. Taylor, 49 Miss. 552. The three cases last cited were actions brought by foreign administrators on judgments which they had recovered as such administrators in their own States, and they were allowed to sue upon the judgments in their own names in the other States. See, also, Morton v. Hatch, 54 Mo. 408. See also on this subject Story on Confl. of Laws, §§ 516, 517. * * *

There is nothing in the foregoing in conflict with what is laid down in Booth v. Clark, 17 How. 322. In that case the action was attempted to be maintained in the circuit court for the District of Columbia on the mere order of a chancery court of the State of New York appointing a receiver. Booth, who was so appointed, failed to show that he had ever had possession of the claim, or the evidences of the claim, the proceeds of which the plaintiff (Booth) endeavored to recover. On the contrary, the claim had always remained in the possession of Clark until it went into the hands of his assignee in bankruptcy, and came back to Clark's possession under a purchase by Clark at a sale made by her assignee. The court dwells on the delay of the receiver to take steps to get possession of this claim as a material fact in the case. After pointing out the means by which, through the aid of the court, he could have obtained possession of this claim, it is observed in the opinion: "Such, however, was not the course pursued in this case, though the debtor was then a resident of the State of New York, and amenable to the jurisdiction of the court. No motion was made to force Clark to comply with the injunction which Camara had obtained under the creditor's bill. The matter was allowed to rest for seven years, Camara being aware that Clark had a pecuniary claim upon the republic of Mexico, at least as early as in the year 1843. The receiver during all that time took no action."

The essential nature of the action in Booth v. Clark is correctly set forth in the opinion of the court in Hazard v. Durant, 19 Fed. Rep. 477. It was there characterized, and properly characterized, as an action by a receiver, a mere officer and servant of the court appointing him, and having no title to the fund by assignment or conveyance, or other lien or interest than that derived from his appointment. It may be well conceded that such an officer, on such a showing of title, cannot recover in a foreign jurisdiction. If Booth, the receiver in Booth v. Clark, had, after his appointment as receiver, got possession of the Mexican claim prior to its coming to the hands of Clark's assignee in bankruptcy, and such had been made to appear in his action, the court, would, no doubt, in accordance with the principle of its rule laid down in Biddle v. Wilkins, 1 Pet., *supra*, have held in favor of Booth. Booth would then have shown an individual and personal right to recover. The cases cited by the counsel for appellant, which follow Booth v. Clark, are like it in the material feature above pointed out. The receiver in all such cases relied on his order of appointment merely, to recover. It cannot escape observation that if this court sanctions the contention of appellant's counsel it will authorize the taking of property from the hands of a court, having ample jurisdiction, which has, through the agency of a receiver, (its own instrument,) gotten lawful possession of property, and whose possession was lawful, when this property was attached here.

The statements made in the note referred to in the prevailing opinion relate merely to a suit by a receiver in a foreign jurisdiction, where he has never reduced the property to possession, and relies solely on the order of the appointment to recover, as a careful perusal of the note will make evident. There is no case cited in the note which holds that a receiver, after he has reduced the property of the litigant to possession, and it is taken from him, cannot sue for it in any jurisdiction where he can find it. The title vests in the appointed receiver when he has reduced the property to possession, and on this title he can recover. His right to recover rests on his right and title procured in the mode above pointed out, and is not allowed in any consideration of comity. Title vests, and in consequence a right to recover in the courts of every civilized country, as a matter, not of comity, but of right. No court has the right to take the property of one person and give it to another, or have it sold for the benefit of another. Considerations of comity only arise where the receiver sues in a foreign jurisdiction on the mere order of appointment. Considerations of comity allow such suit, where there is no legal policy which forbids it, and it does not affect the rights of creditors or other persons, citizens of the jurisdiction where the suit is brougnt. Such is Hurd v. Elizabeth, 41 N. J. Law, 1, where the suit was allowed to be maintained on considerations of comity. The special property vested in the receiver gives him a title on which he can recover anywhere. A sheriff gets only a special property where he has levied an execution, and on such title he can sue and recover anywhere. If a sheriff of this State seizes horses under a writ of attachment or execution within its limits, and the horses escape into the State of Nevada, and were taken possession of by a third person, we cannot see why he cannot recover in a suit in a Nevada court, even against an attaching creditor there.

The title of the receiver vested when he reduced

this car to possession by the consent of the corporation. He sent it out of the State of Missouri, where he had it, for a lawful purpose. Why has a creditor a right to attach it? It was not the property of the corporation when it was attached, but of the receiver of the court, of which the receiver is the hand and instrument. I cannot conceive how a creditor can attach the property of one person to pay a debt due him by another. The statement in the complaint that the plaintiffs were appointed receivers by the court of Missouri shows the origin of plaintiff's right; but it is further alleged that the plaintiffs took possession of the car, and held it in possession until such possession was interfered with by the defendant, as afterwards stated in the complaint. The plaintiffs count specially on their own possession. We see nothing herein to prevent the plaintiffs from recovering on their individual rights. The averment as to their being receivers may be regarded as *descriptio personæ*, and may be rejected as surplusage, in accordance with the rule laid down in Lewis v. Adams, 70 Cal. 411, 412, 11 Pac. Rep. 833.

An interesting question of duress and of the recovery of money collected by threats, came before the Court of Appeals of New York, in Adams v. Irving National Bank, 23 N. E. Rep. 7. There it was held that money paid by a wife in settlement of her husband's debt, upon a threat by the creditors to arrest the husband if the debt was not paid, may be recovered back, though there was lawful ground for arresting the husband. The court says:

It is claimed by the appellant that the plaintiff was not entitled to recover, if there was a lawful ground for the arrest of her husband; in other words, that a threat of unlawful arrest and imprisonment is necessary to constitute a duress *per minas*. This was the strict common-law rule applied in cases where the duress was against the person seeking to be relieved from his contract. But in practice the narrowness of this doctrine was much mitigated, and money paid under practical compulsion was in many cases allowed to be recovered back, as, for example, payment made to obtain goods wrongfully detained; excessive fees, when taken under color of office; excessive charges collected for performance of a duty, etc. In all such cases there was a moral coercion which destroyed the contract. The rule cited by the apellant has no application to a case like the present where money has been obtained from a wife by threats to imprison her husband and none of the cases cited by the appellant so hold. Insurance Co. v. Meeker, 85 N. Y. 614, was a case where the defendant held to be estopped to deny the vality of a mortgage. In Haynes v. Rudd, 83 N. Y. 251, and 102 N. Y. 372, 7 N. E. Rep. 287, the decisions went upon the ground that the note was given to compound a felony, and the contract was for that reason illegal. Smith v. Rowley, 66 Barb. 502, was decided on grounds similar to Haynes v. Rudd. In Solinger v. Earle, 82 N. Y. 393, plaintiff gave the note in suit to induce the defendant to sign a composition of debts of a firm of Newman & Bernhard. The note was transferred to a *bona fide* holder, and, having been compelled to pay it, plaintiff brought the suit to recover from defendants the amount paid. The court held the contract was illegal and the same rule that would have protected plaintiff in an action on the note by the payees protected the defendant in resisting an action to recover back the money paid on it. Farmer v. Walter, 2 Edw. Ch. 601; Knapp v. Hyde, 60 Barb. 80; Dunham v. Griswold, 100 N. Y. 224, 3 N. E. Rep. 76; Quincey v. White, 63 N. Y. 370,—were actions in which the contract was made by the person against whom the duress was claimed to have been exerted.

It is not an accurate use of language to apply the term "duress" to the facts upon which the plaintiff seeks to recover. The case falls rather within the equitable principle which renders voidable, contracts obtained by undue influence. However we may classify the case, the rule is firmly established that, in relation to husband and wife or parent and child, each may avoid a contract induced and obtained by threats of imprisonment of the other, and it is of no consequence whether the threat is of a lawful or unlawful imprisonment. Eadie v. Slimmon, 56 N. Y. 9 is a leading authority on this question. In that case assignment of a life insurance policy was obtained by threats to prosecute the plaintiff's husband criminally for embezzlement. The husband whose life was insured having died, the action was brought to determine the ownership of the money due from the insurance company. Judge Smith, who delivered the opinion of the court, says: "The assignment from the plaintiff to the defendant was most clearly extorted by a species of force, terrorism, and coercion which overcame free agency; in which fear sought security in concession to threats and to apprehensions of injury. It was made as the only way to escape from a sort of moral duress more distressing than any fear of bodily injury or physical constraint. * * * A deed executed at such a time, under such circumstances, should be deemed obtained by undue influence, and ought not to stand." Five judges appear to have concurred in the part of the opinion quoted. Judge Denio concurred on the ground that the policy was not assignable, and Judge Wright dissented. The case was cited as an example of duress of person in Peyser v. Mayor, etc., 70 N. Y. 501, and as an authority for avoiding a note obtained by duress in Osborn v. Robbins, 36 N. Y. 371. It has frequently been cited in the supreme court (Fisher v. Bishop, 36 Hun, 114; Haynes v. Rudd, 30 Hun, 237; Ingersoll v. Roe, 65 Barb. 357; Schoener v. Lissauer, 36 Hun, 102), and in other States, and in the text-books, and has thus become a leading authority upon the question under discussion. It is nowhere suggested in that case, either in the facts or in the opinion, that it was necessary to sustain the judgment in favor of the plaintiff, that the threat must have been of an unlawful or illegal arrest. For all that appears, the husband was guilty of the charge made, and on that assumption it is peculiarly like the case at bar. Other authorities sustained the same principle.

In Haynes v. Rudd, 30 Hun, 237, it was said: "We think that when threats of a lawful prosecution are purposely resorted to for the purpose of overcoming the will of the party threatened by intimidating or terrifying him, they amount to such duress or pressure as will avoid a contract thereby obtained." This statement of the law was not disturbed by this court, the reversal being put on other grounds. In Schoener v. Lissaner, 107 N. Y. 111, 13 N. E. 741, a bond and mortgage was obtained from the mortgagor by the threat that, unless it was given, his son, who was charged with embezzlement, would go to State's prison. The mortgage was set aside, and this court sustained the judgment. After stating the facts, it

was said by Judge Rapallo: "On the merits this judgment is sustained by Bayley v. Williams, 4 Giff. 638, affirmed L. R. 1 H. L. 200, and Davies v. Insurance Co., L. R. 8 Ch. Div. 469." The first case cited by Judge Rapallo fully sustains the recovery in the case at bar. In Harris v. Carmody, 131 Mass. 51, a mortgage was obtained from a father on the threat that his son, who was charged with forging his father's name to notes held by the plaintiff, would be sent to the State-prison. It was held that the father could avoid the mortgage on the ground that it was made to relieve the son from duress. See, also, Taylor v. Jaques, 106 Mass. 291. In none of the cases cited was it suggested that the threat which induced the making of the contract was of an illegal prosecution, or an unlawful arrest, and in most of them it appears that the person charged with an offense was guilty. The principle which appears to underlie all of this class of cases is that, whenever a party is so situated as to exercise a controlling influence over the will, conduct, and interest of another, contracts thus made will be set aside. 1 Story Eq., Jur. §§ 239-251; 2 Pom. Eq., Jur. §§ 942, 943; Lomerson v. Johnston, 44 N. J. Eq. 93, 13 Atl. Rep. 8; Ingersoll v. Roe, 65 Barb. 346; Fisher v. Bishop, 36 Hun. 112, 108 N. Y. 25, 15 N. E. Rep. 331; Barry v. Society, 59 N. Y, 587. In the last case cited it was said: "Where there exists coercion, threats, compulsion, and undue influence, there is no volition. There is no intention or purpose but to yield to moral pressure, for relief from it. A case is presented more analogous to a parting with property by robbery. No title is made through a possession thus acquired." It was not error, therefore, for the court to deny the motion to dismiss the complaint on the ground that there was no evidence that the money was paid under duress. Upon the evidence it was a question of fact whether the agreement was executed and the money paid in consequence of threats and undue influence. Dunham v. Griswold, 100 N. Y. 224, 3 N. E. Rep. 76. If the money was paid by the plaintiff through fear produced by Mr. Castre's representations that, if the claim was not settled, her husband would be arrested and imprisoned, the payment was not a voluntary one, and the defendant obtained no title to the money received.

See, also, on this subject the late case of Ingalls v. Miller (Ind.), 22 N. E. Rep. 995, where it was held that money obtained from a weak-minded, illiterate old man, upon false representations made by several, one of whom is an attorney, that they had a good cause of action against him, which they would prosecute, causing him ruinous litigation, may be recovered by him, the doctrine of voluntary payment having no application to such a case.

GOOD-WILL.

I. What Constitutes Good-will.
II. Good-will in Partnerships.
  A. Good-will Considered as Partnership Property.
  B. Survivorship of Good-will in Partnerships.
  C. Retiring Partners May Carry on Similar Business.
  D. Right to use Firm Name.
III. Remedy for Infringement of Good-will.

I. *What Constitutes Good-will.*—The good-will of a business consists in the advantage or benefit which arises from an established connection with customers, in the reputation for skill, or any other advantage acquired by the old firm, and in the chance of keeping and improving the former connection, and is an important and valuable interest which the law recognizes and will protect.[1] Considered as property, good-will is but little understood and its value not fully appreciated by the commercial world. While it is not, strictly speaking, property, for good-will is intangible and merely incident to property,[2] yet it is many times even more valuable than the property to which it attaches, and often induces persons to purchase an established business, paying, therefore, a much larger price than the tangible property is really worth. As, for instance, in the case of a public house which has been long and favorably known, and by reason of this good reputation people frequent it, good-will attaches to the house and greatly increases its value and runs with the house, entitling the vendee or mortgagee to whatever benefit is derived therefrom.[3] As a rule, it may be stated that good-will is never an incident of a stock of merchandise, but, generally speaking, it is an incident of locality or place of the store-room or place of business,[4] and in many instances the mere conveyance of the property carries the good-will with it, as was held where a shop was sold, although not specifically mentioned.[5] The value of this

[1] Story on Part. § 99; Pomeroy's Eq. Jur. § 1355; Cruttwell v. Lye, 17 Ves. 335; Potter v. Comis, 10 Exch. 147; Dwight v. Hamilton, 113 Mass. 175; Carry v. Gunnison (Iowa), N. W. Rep. 881; Barber v. Comrs. Ins. Co. (N. Y.), 15 Fed. Rep. 312; Peltz v. Eichele, 62 Mo. 171.

[2] Rawson v. Pratt, 91 Ind. 9.

[3] Cooper v. Metro, Brd. of Pub. Wrks., 25 Ch. Div. 447; Chissum v. Dewes, 5 Russ. 29.

[4] Rawson v. Pratt, 91 Ind. 9.

[5] Chessum v. Dewes, 5 Russ. 29.

good-will depends to a great extent on the absence of competition on the part of those who established and built up the business, which business is favorably known to the public, who will be likely to continue business with the new firm, depending upon the reputation established by the former managers,[6] or as a learned writer expresses it, "that peculiar right, or rather expectancy called good-will, assumes that a certain business has been established and carried on at some specific place, it consists in the probability based upon the habits of man, that the persons who have been accustomed to deal at that specific place, as well as others, will continue to come to such place and deal in the future."[7] And it has been held in a number of cases, that neither the old firm nor any of the members thereof has a right to interfere with or solicit business from customers of the old firm, by letters, cards, circulars or otherwise.[8] The rule as laid down in these cases seems to have been greatly modified in a number of late decisions, and we think the better rule, as sustained by the weight of authorities, to be that the vendors of an established business, carrying with it, either by express words or by implication of law, the good-will, may set up a similar business in the same place, and by advertising in the papers, and by circulars, solicit the trade of the old customers, so long as they do not represent themselves as the successors of the old firm, or represent the vendees as not carrying on the business.[9] The mere sale of the good-will of a business will not be of itself sufficient to preclude the seller from engaging in a separate and independent business of the same kind in the same village or city. To have that effect there must be an express agreement, based upon a good and valuable consideration, and not contrary to public policy.[10] Therefore, the value of the good-will is the advantage secured in succeeding to the business without reference to excluding any other person from the same business.[11]

II. *Good-will in Partnership.*—A. *Good-will Considered as Partnership Property.* While good-will is undoubtedly partnership property, it is not, strictly speaking, a part of the assets of the partnership, of which, upon a dissolution thereof, a division can be compelled, unless in cases where a sale of the whole premises and stock be ordered. When so sold the good-will may create in the minds of the purchasers an extra value and inducement to purchase, thus largely increasing the selling price, of which each partner will be entitled to his share.[12] The good-will of an establishment has long been recognized as partnership property by courts of equity, and when called upon they will order it to be sold, and will restrain partners from pursuing a course that would destroy its value.[13]

B. *Survivorship of Good-will in Partnerships.*—For many years it was a mooted question as to whether good-will survives, and upon the death of one partner becomes the exclusive property of the surviving partners, or whether it passes to the legal representatives of the deceased partner. In Hammond v. Douglas,[14] Lord Rosslyn held that the good-will of a trade survives, and is not to be considered as partnership property, to which the representatives of a deceased partner have any right. But Lord Eldon, in reviewing this opinion in the case of Crawshay v. Collins,[15] expressed doubts of the propriety of that determination, considering it difficult to draw any solid distinction between the lease of the partnership premises

[6] Ginesi v. Cooper, L. R. 14 Ch. Div. 596; Wallingford v. Burr, 17 Neb. 137.

[7] Pomeroy's Eq. Jur. § 1355.

[8] Leggott v. Barrett, 15 Ch. Div. 306; Burrows v. Foster, 22 Beav. 18; Labouchere v. Dawson, L. R. 13 Eq. Cas. 322; Ginesi v. Cooper, L. R. 14 Ch. Div. 596, 599.

[9] Churton v. Douglas, John. 174; Cottrell v. Babcock Mnfg. Co., 54 Conn. 123; Glenny v. Smith, 2 Dr. & Sm. 416; Colton v. Thomas, 3 Brewst. (Pa.) 308; Glen & Hall Mnfg. Co. v. Hall, 61 N. Y. 234.

[10] Churton v. Douglas, Johns, Ch. (Eng.) 174; White v. Jones, 1 Abb. (N. Y.) 328; Moody v. Thomas, 1 Disney (Ohio), 294; Rupp v. Over, 3 Brewst. (Pa.) 133; Nelson v. Johnson, 36 N. W. Rep. 868; Caswell v. Hayard, 2 N. Y. St. 283; Washburn v. Washburn, 32 N. W. Rep. 551; Hoxie v. Chancey, 10 N. E. Rep. 713; Pearson v. Pearson, 27 Ch. Div. 145; Cottrell v. Babcock Pr. Press Co., 6 Atl. Rep. 791; Bugamini v. Bastian, 48 Am. Rep. 216; Smally v. Green, 52 Iowa, 241.

[11] Rammelsberg v. Mitchell, 29 Ohio St. 52, 54. A late Mississippi case decides that an insurance agency and its good-will do not constitute equitable assets for the agent's creditors. Tierney v. Klein, Miss. South. Rep. 739.

[12] Crawshay v. Collins, 15 Ves. 218; Featherstonbaugh v. Fenwick, 17 Ves. 298; Mellersh v. Keen, 28 Beav. 453.

[13] Sheppard v. Boggs, 9 Neb. 257; Boon v. Moss, 70 N. Y. 465.

[14] 5 Ves. 539.

[15] 15 Ves. 227.

and good-will. The case of Hammond v. Douglas, must now be considered as overruled, the later authorities being opposed to the doctrine that the good-will belongs to the surviving partners for their exclusive benefit.[16]

C. *Retiring Partner May Carry on Similar Business.*—It is now well settled that the sale by one partner of all his interest, including the good-will, does not preclude him from carrying on a similar business next door so long as he does not hold himself out to the world as continuing the identical business sold,[17] and has not entered into any express stipulations that he will not engage in such similar business in the same place, so upon a dissolution of the partnership each partner may carry on the same business in the same neighborhood on his own account.[18] The same rule applies to surviving partners.[19]

D. *Right to Use the Firm Name.* — The right to use the name of a well established and favorably known firm is often of great value, and the question whether the right to use the firm name belonged to the surviving partners, or was to be considered as part of the good-will belonging to the estate of the deceased partner, was open to much discussion, and could not be considered as settled until the case of Lewis v. Langdon.[20] In that case the court held that this valuable right, *i. e.*, to use the firm name, cannot be considered as good-will, and belongs exclusively to the surviving partners. This principle was sustained in a number of cases.[21] This question was exhaustively discussed in the late case of Meneely v. Meneely,[22] decided by the Court of Appeals of the State of New York, which may now be considered the leading case upon this point. It was an action brought to restrain defendants from using the name "Meneely" in the business of bell founding. The facts presented were as follows: Andrew Meneely, father of plaintiffs, and of defendant Clinton H. Meneely, commenced the business of making and selling bells in 1826, at West Troy, which he carried on until 1851, when the plaintiff Edwin A. Meneely entered into copartnership with him, and they carried on the business at the same place and in the same foundry until the death of Andrew Meneely. After the death of the said Andrew Meneely, the plaintiffs as co-partners carried on the business at the same place. And at the time this action was instituted were carrying on the business under the name of E. A. & G. R. Meneely. The business was known from its establishment as the "Meneely Bell Foundry," and by reason of the skill bestowed upon the manufacture of bells, had achieved a great reputation, etc. Plaintiffs cast upon all bells made by them, "Meneely's, West Troy, N. Y." In 1870, Clinton H. Meneely and George Kimberly formed a copartnership and manufactured similar bells at Troy, under the name of Meneely & Kimberly. This firm cast upon its bells the words "Meneely & Kimberly, Troy, N. Y." It was against the use of this name the injunction was asked. In delivering the opinion of the court, Rapallo, J., said: "If the defendants were using the name of Meneely with the intention of holding themselves out as the successors of Andrew Meneely, and as the proprietors and managers of the old established foundry which was being conducted by the plaintiffs, and thus enticing away the plaintiffs' customers, and if with that intention they used the name in such a way as to make it appear to be that of the plaintiffs' firm, or resorted to any artifice to induce the belief that the establishment of the defendants was the same as that of the plaintiffs, and, perhaps, if without any fraudulent intent they had done acts calculated to mislead the public as to the identity of the establishments, and produce injury to the plaintiffs beyond that which resulted from the similarity of name." Then under these circumstances a court of equity might restrain the defendants from committing such acts tending to mislead the public and injure the plaintiffs, but the court held that an injunction could not issue which "would absolutely restrain the defendant Meneely from

[16] Wedderburn v. Wedderburn, 22 Beav. 104; Mellersh v. Keen, 22 Beav. 236; Turner v. Mayor, 3 Griff. 442; Smith v Everett, 27 Beav. 446; Giblett v. Read, 9 Mod. 459; Boon v. Moss, 70 N. Y. 465.

[17] Hall v. Barrow. 33 L. J. N. S. Ch. 204; Morgan v. Schuyler, 79 N. Y. 490; White v. Jones, 1 Abb. (N. Y.) 328; Rupp v. Over, 3 Brewst. (Pa.) 133.

[18] Bradbury v. Dickens, 27 Beav. 236; Hoodham v. Pottage, L. R. 8 Ch. 91.

[19] Davies v. Hodgson. 25 Beav. 177.

[20] 7 Sm. 421.

[21] Webster v. Webster, 3 Swans. 490; Robertson v. Quiddington, 28 Beav. 529; Dent v. Turpin, 2 John. & Hem. 139.

[22] 62 N. Y. 427.

the use of his own name in any way, or firm. The manner of using the name is all that would be enjoined." In reviewing the action of the referee who granted the injunction in the first instance, the court said: "The use of the name 'Meneely' in any way, was all that was enjoined, and that was the very thing which should not have been enjoined." The court cited with approval a number of cases,[23] which established the rule to be that every man has the absolute right to use his own name in business in any manner he may wish, even though it be the same as that of others engaged in a similar business, and may, to some extent, tend to mislead the public, provided he does nothing to encourage the belief that the establishments are identical.

III. *Remedy for Infringements of Good-will.*—The proper remedy for the infringement of good-will is by injunction. The good-will of a business as embodied in a firm name, or in the labels used, will be protected, upon principles analogous to those applied in cases of infringement of trade-marks.[24] Where the good-will of a business has been assigned, any interference with it by the assignors will be restrained by injunction.[25] The case of Cruttwell v. Lye,[26] seems to be among the earliest in which a court of chancery was called upon to restrain a violation or infringement of good-will, the jurisdiction of the court and the right to issue an injunction was not disputed, and the injunction was refused on the sole ground that the facts did not justify the court in granting the injunction prayed. In that case the facts were, that George and Edward Lye had been engaged in the business of common carriers, until a commission of bankruptcy issued against them, under which the business was sold in different lots together with the good-will, one lot was purchased by plaintiff, the second lot by a nephew of defendants. Edward Lye was again put into that part of the business, on which occasion he stated by advertisement and by hand-bills, "that being reinstated in his business he informs the public that his wagons will set out at the usual hours," describing the course, not by the old road but by a different one. The plaintiffs moved for an injunction. The chancellor (Lord Eldon), after stating that the motion was novel in its circumstances, if not in principle, and that he would not grant the injunction immediately but desired to hear it discussed at the bar, reviewed the facts and refused to grant the injunction upon the ground that, though the bankrupt advertises that he is reinstated in the carrying business, "it amounts to no more than that he asserts a right to set up this trade, and has set it up, as the like but not the same trade."

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[23] Crofts v. Day, 7 Beav. 84; Rodgers v. Norvill, 5 M. G. & S. 109; Holloway v. Holloway, 13 Beav. 209; Burgess v. Burgess, 17 E. L. & E. 257; Clark v. Clark, 25 Barb. 79; Edelsten v. Edelsten, 1 De G. J. & S. 185; Howe v. Howe, 50 Barb. 236; Faber v. Faber, 49 *Id.* 357; Schweitzer v. Atkins, 46 L. J. (N. S.) 37; Stonebraker v. Stonebraker, 33 Md. 252; Holmbold v. Holmbold, N. Y. Sun, 1872; James v. James, L. R. 13 Eq. Cas. 421; Laurens v. Laurens, Brown's Trade-marks, 402; Caminard v. Caminard, *Id.* 402; Mer. Brit. Co. v. Parker, 39 Conn. 450; Wolf v. Burke, 7 Lans. 156; Pinand v. Pinand, *Id.* 403; Roederer v. Roederer, *Id.* 329.

[24] Peltz v. Eichele, 62 Mo. 171.

[25] Darby v. Whitaker, 4 Drew. 134; Chissum v. Dewes, 5 Russ. 29; Whittaker v. Howe, 3 Beav. 383; Mitchell v. Reynolds, 1 Smith's Lead. Cas. 705; Pomeroy's Eq. Jur. § 1355.

[26] Cruttwell v. Lye, 17 Ves. 335. See 19 Cent. L. J. 362, for article on Good-will.

INNKEEPERS—LOSS OF BAGGAGE.

COSKERY V. NAGLE.

Supreme Court of Georgia, November 18, 1889.

1. An innkeeper is responsible for baggage lost where the guest gave the check therefor to a servant of the hotel, who in turn placed it in the hands of another party to be delivered by him at the hotel.

2. The hotel proprietor is not relieved from liability by the fact that the porter was not authorized to receive baggage or checks therefor from guests at the depot, but merely to advertise and solicit patronage for the hotel.

3. Plaintiff's failure to inform the porter that his valise contained valuable clothing and jewelry was not negligence.

BLANDFORD, J.: 1. The plaintiff was met at the depot by a porter of the hotel, who wore a cap with the name of the hotel on it, and who cried the name of the hotel, and he was shown by this porter to the omnibus which was to take him to the hotel. He delivered to the porter the check for his baggage, telling him that he was anxious to have it promptly; to which the porter replied that it would come right along, in another wagon. The porter, in the presence of the plaintiff, gave the check to another man, who, according to the plaintiff's testimony, he "did not know was any other than an *attache* of the

hotel." The plaintiff had stopped at the same hotel about a week before, at which time this porter was connected with the hotel in the same way, and, when he intrusted his check to him on this occasion, he recognized him as the same porter who on the former occasion had performed similar services for him. The plaintiff did not know that the omnibus or the wagon which brought the baggage was run by another person than the proprietor of the hotel, and when he paid his fare on the former occasion suposed he was paying it to the hotel. The omnibus was the usual mode of conveyance from the depot to the hotel, the proprietor of the hotel having agreed with the transfer company for the omnibus and wagon to run to the hotel, and one of the omnibuses had the name of the hotel on it. He was taken to the hotel and received as a guest. The valise was not delivered to the hotel. It was delivered by the railroad company to the holder of the check, and there was no further trace of it. The plaintiff demanded it of the hotel proprietor, and was then told by him that the transfer company was liable. He brought suit against the hotel proprietor for the value of his valise and its contents, and a verdict for the full amount was rendered in his favor.

An innkeeper is bound to extraordinary diligence in preserving the property of his guests intrusted to his care. Code, § 2117. It need not be so intrusted by actual delivery. *Id.* § 2118. In case of loss, the presumption is want of proper diligence in the landlord. Negligence or default of the guest himself, of which the loss is a consequence, is a sufficient defense. *Id.* § 2120. It has been held by this court that "where a hotelkeeper sends his porter to the cars, to receive the baggage of persons traveling, and baggage is delivered to the porter, and the traveler becomes the guest of the hotel, the liability of the innkeeper, as such, for the baggage, begins on the delivery to the porter, and continues until redelivery to the actual custody of the guest." Sasseen v. Clark, 37 Ga. 242.

The innkeeper (who is the plaintiff in error here) seeks to escape the effect of this decision by evidence that the porter in the present case was not authorized to receive baggage, checks for baggage, or guests at the depot; his duty being simply to advertise the hotel and suggest it to strangers. We do not think that this makes any difference in the present case, it not being shown that the plaintiff knew of any such limitation upon the porter's authority. He simply knew that he was the porter of the hotel,—a servant whose duty ordinarily, as the name implies, is to carry parcels and luggage. "Where the innkeeper sends his carriage driver or porter to the railroad station to solicit custom, he may become responsible for his guest's baggage from the moment the traveler confides it to the driver's or the porter's hands," Schouler, Bailm. 569; citing Sasseen v. Clark, *supra*, and Dickinson v. Winchester, 4 Cush. 114. In the latter case the doctrine of *respondeat superior*, which is invoked by defendant here, is discussed by Shaw, C. J., and the distinction made that while the innkeeper, who had employed the conveyance of another to meet at the cars and carry to his hotel passengers who should choose to come here, might not be liable if the carriage driver had negligently run over somebody in the street, yet he would be liable for the negligent loss of a traveler's baggage by the carriage driver, where travelers were directed by him, in his own interest, to such conveyance, and he would be estopped to deny that the person thus actually employed was his agent for that purpose. "The usages of travel together with the vast variety of goods, parcels, and baggage which are customarily carried by travelers, are to be considered in determining what circumstances will charge the innkeeper with the care of property coming to his house. Horses and carriages are properly intrusted to the hostler, and parcels to the agent or servant accustomed to receive them." Edw. Bailm. § 460.

The defendant insisted that the plaintiff was negligent in having failed to call the porter's attention to the fact that his valise contained valuable jewelry and clothing; and in support of this position we are cited to the case of Fowler v. Dorlon, 24 Barb. 384. On examination it does not seem to help the plaintiff in error on this point, and seems to be against him in another respect. The plaintiff in that case, on alighting from the train at the depot, gave the check for his valise to one Blake, with a request to get his valise. Blake was a employee of the stage line which had its office in the hotel, and he boarded at the hotel, and with the knowledge of the proprietor, had been in the habit of soliciting custom for the house. Blake got the valise, returned, and set it down, and went off and left it, in order to attend to his duties with the stage company. The plaintiff, who saw him approaching with the valise, but did not see him set it down, went on his way to the defendant's hotel where he was received as a guest. He had said nothing to Blake evincing an intention to become the defendant's guest, handed him the check, and told him to get the valise. In discussing the plaintiff's diligence the court says: "He was not bound to disclose the fact that the valise contained money." The court adds: "If he thought fit to intrust a man in the situation of Blake with so valuable an article, it would seem but a reasonable exercise of prudence that he should at least request him to deliver it at the hotel without delay." The evidence shows that this was done in the present case. As to the authority of Blake as agent of the hotel, the court below in that case charged that "if Blake was in the actual employment of the defendants, or, though not in their actual employment, if he was acting with the knowledge of the defendants, in such a manner as to induce the guest of the defendants to believe that he was their servant they were liable for his acts, and the baggage received by him of Barker [the

plaintiff] was within the custody of the defendants as innkeepers." The only criticism the court made upon this charge was that "the judge should have gone further, and should have submitted to the jury the distinct question whether Blake received the baggage as the servant of the defendants, as the charge stands in the case, this fact seems to have been assumed. Bnt there are no exceptions to the charge, and * * * this defect is not available to the defendants."

An English case which seems in point is the following (Bather v. Day, 8 Law T., N. S., 205, [1863]): The plaintiff arrived at the defendant's inn with a mare and gig, which were taken to a stable yard some distance from the inn, where it was customary to take horses and vehicles of guests. One Rowles, who acted as hostler for the guests, kept this stable, and was an independent livery stable-keeper, doing business with the public generally, besides the guests of the inn. He received no wages from the inn, and did not reside there. While the plaintiff was temporarily away from the inn, but while the horse was still in the stable, the stable-keeper negligently injured the horse. The plaintiff sued the innkeeper, and the inkeeper contended that the rule of master and servant did not apply so as to make her responsible, the stables not being hers, but the stable-keepers. The court gave judgment against the innkeeper, and the court of exchequer, on appeal, affirmed the judgment, holding that while, as between the stable-keeper and the innkeeper, the stables were not under the innkeeper's control, yet, as between the innkeeper and the plaintiff, they were the stables of the inn, and the stable-man the hostler of the inn. The court said: "We cannot enter into the private arrangement between the keeper and the person acting as her 'master of the horse.' It is the apparent relation, * * * and not the private one, with which we have to deal. The respondent was a guest, and the horse was 'taken around to the stables in the usual way,' " etc.

The liability of an innkeeper, at common law and in this State, is that of an insurer. We know that this is a harsh rule, but it seems to have been the policy of the law of England, which was adopted by this State, to hold landlords and proprietors of inns or hotels, or houses kept for the accommodation of transient guests, wayfarers, and travelers, to the utmost responsibility and liability for the baggage and goods of such persons intrusted to their care. When a traveler arrives at the depot, and is met by one who is the porter of an inn, hotel, or house kept for the purpose above stated, who indicates to the traveler a certain conveyance by which he can go to such place or not, and the traveler delivers to him his baggage or the check therefor, the traveler is thereby a guest of such inn, hotel, or house, so far as to render the proprietor thereof liable for the safe-keeping or redelivery of the same. The liability of the proprietor commences from the time of the delivery of the baggage or check to the porter. All that the traveler must do is to assure himself that the person representing himself as such porter is in fact the porter of the house. Any private arrangement between the landlord and a carrier for the the transportation of persons and baggage to his house does not affect the traveler, who has the right to assume, without any knowledge to the contrary, that such carrier is in fact authorized by the proprietor of the house to safely and securely transport himself and his baggage, and, when loss occurs by the negligence of such carrier, the proprietor of the house is liable to the traveler. And this rule is founded, not upon the fact that the law gives to the landlord or proprietor of the house a lien upon the baggage or goods committed to his care, but upon the policy of the law that such should be the liability of the proprietor. In this case there never could have been any lien of the landlord upon the baggage at the time the loss occurred, but the liability of the landlord was the same notwithstanding no such lien existed. The lien of the landlord grows out of the indebtedness of the guest for his board during his stay at the house. These views, we think, are sufficiently sustained by the authorities above referred to.

2. The exceptions which have been taken by the plaintiff in error to the charge of the court and refusals to charge, in our opinion, are immaterial, under the facts of the case. The verdict was demanded by the evidence and the law, and the judgment is affirmed.

NOTE.—Calye's Case,[1] decided by the King's Bench, is the leading case upon the subject of the liability of innkeepers in respect to their guests' property. In that case it was resolved *per totam curiam* that if a man comes to a common inn and delivers his horse to the hostler, and requires him to put the horse to pasture, which is done accordingly, and the horse is stolen, the innkeeper is not liable. For an innkeeper by law, shall not be held liable for property that is out of his inn, but only for those things which are *infra hospitium*, and because the horse, which at the request of the owner is put to pasture, is not *infra hospitium;* for this reason the innholder is not bound by law for him, if he is stolen out of the pasture. But it was held that, if the owner doth not require it, but the innholder of his own head puts the guest's horse to grass, he shall answer for him if he be stolen. This rule, established as early as 26th Elizabeth, applies with equal force to-day, and is cited in almost all the English and American cases.

It was held in several cases that the goods need not be placed in the special keeping of the innkeeper in order to make him liable.[2] A delivery of the goods into the custody of the innkeeper is not necessary to charge him with, for although the guest doth not deliver them or acquaint the innkeeper with them, still the latter is bound to pay for them if they are stolen.[3] Thus, if an innkeeper advertises to carry passengers free from the station, and a passenger gets into a hack, which by agreement with the owners he may

1 8 Coke, 32.

2 Packard v. Northcraft, 2 Metc. (Ky.) 459; Norcross v. Norcross, 53 Me. 153; Burrows v. Trieber, 21 Md. 320.

3 Jalie v. Cardinal, 35 Wis. 118; Mason v. Thompson, 9 Pick. 289; Weisenger v. Taylor, 1 Bush, 275.

use for that purpose, and loses a trunk, the innkeeper is liable.[4] And so, where the servant of the innkeeper takes the baggage of the passenger to carry to the cars, the innkeeper is responsible for it until delivered at the cars.[5]

It may be considered as well settled that innkeepers, as well as common carriers, are insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God, the common enemy, or inevitable accident, or the neglect or fault of the owner.[6] And this liability is not restricted to such sums only as are necessary and designed for the ordinary traveling expenses of the guest.[7] The opposite view is, however, held in Simon v. Miller.[8]

In Armstead v. Weld,[9] where a cash box easily opened had been left in the commercial room of an inn, under circumstances showing gross negligence in the guest, the jury were instructed that gross negligence on the part of the guest would relieve the innkeeper from his common law liability. The jury having found for the defendant on the ground that the plaintiff had been guilty of gross negligence, the verdict was upheld, Lord Campbell observing that he doubted if it were necessary to show gross negligence. But in another case, where a traveler went to an inn with several packages, one of which was, by his desire, taken by a servant into the commercial room and the others to his bed-room, and the package placed in the commercial room was stolen, the innkeeper was held responsible.[10]

Where the goods of a traveler are delivered at the usual place for such goods at the inn, the innkeeper is chargeable, though the goods are not strictly within the inn. Thus, if a horse is delivered to the hostler at the inn to be fed, and the hostler takes off the saddle and bridle and deposits them in the barn and they are stolen, the innkeeper is liable for the loss.[11] It is not necessary for the guest to notify an innkeeper as to the value and amount of his baggage; and it has been held that when goods have been stolen from the chamber of the guest, and the guest gave no notice to the innkeeper that they were left there, yet the innkeeper will be responsible for their loss.[12]

[4] Dickenson v. Winchester, 4 Cush. 144.

[5] Sasseen v. Clark, 57 Ga. 242; Richards v. The London Ry. Co., 7 M. & G. 839.

[6] Mason v. Thompson, 9 Pick. 230; Sibley v. Aldrich, 32 N. H. 553; Shaw v. Berry, 31 Me. 478; Norcross v. Norcross, 53 Me. 163; Hulett v. Swift, 42 Barb. 230; Piper v. Manny, 21 Wend. 283; Hawley v. Smith, 25 Wend. 642; Thicksturn v. Howard, 8 Blackf. 535; Manning v. Wells, 9 Humph. 746; Stevecraft v. Bailey, 25 Iowa, 553; Wilkens v. Earle, 44 N. Y. 172; Fuller v. Cools, 18 Ohio St. 343; Elcox v. Hill, 98 U. S. 218.

[7] Pinkerton v. Woodward, 33 Cal. 557; Smith v. Wilson, 36 Minn. 334.

[8] 7 La. 360.

[9] 17 Q. B. 261.

[10] Richmond v. Smith, 8 B. & C. 9.

[11] Hallenbake v. Fish, 8 Wend. 547; Piper v. Manny, 21 Wend. 283.

[12] Kent v. Shuckard, 2 Barn. & Ad. 803.

JETSAM AND FLOTSAM.

COMITY.—In the *Legal Intelligencer* of December 20th, there is printed a dissenting opinion of Mr. Justice Williams, in the case of Forepaugh v. The R. R. See 29 Cent. L. J. 490. It was the case of a contract with a carrier, made in New York, where the breach occurred. By the words of the contract, the carrier was not liable, and by the law of New York, the agreement was lawful. Because, by our law, the agreement discharging the liability would be contrary to public policy—that is, the policy of this State—Mr. Justice Williams says he would decline to recognize the validity of so much of the contract as regulated the liability. His reason is that comity does not require this at his hands.

The fallacy may best be illustrated by an exact parallel case, because no logical process is involved. A debt is contracted in New York, payable there, and the contract is broken, but suit is brought on it here. The law of New York does, or did, liquidate the damages for the delay at seven per cent. per annnm. The law of Pennsylvania (the fornm) makes that illegal and establishes a different rule. In stating this as an analogy, I must, however, admit there is a logical process, or someting like it, involved, for the illegality in the case put is statutory; in the case decided it is the creation of the court, and their notion of public policy is contrary to the law of nearly all, if not all, civilized States. That is, the courts of Pennsylvania have seen fit to declare illegal what has been sanctioned by congress (Rev. Stat. § 4283, *et seq.*), by New York, by the courts of England, France, Holland, Germany, and Italy (129 U. S. 443, 444). It does not require a very profound mental process, I think, to perceive that a statutory illegality is certainly as binding as one established by the court, founded on their views of public policy, and which they are entitled to change or disregard.

Now, would this judge have directed a jury to compute the damages according to the Pennsylvania rule, or according to the New York rule? And why? merely because the meaning, effect, and legality of the contract is governed by the law of New York thus became a part of that contract. Or, to put another illustration; if the consideration for the promise was asserted to be illegal, by what law would we have ascertained that fact? Plainly the mistake lies in the word comity.

There is a very happy illustration of the rule which really was the one in question, in the case referred to in *The Moxham*, L. R. 1 Prob. Div. 107, which well deserves reading. We have uniformly applied it in the class of cases where death resulting from accident has happened, with the exception of that class where the death occurred where there was no law creating a liability, as on the high seas. In these cases, many gentlemen have conceived, they had a right under their patents to dispense with legislation. In the case of *The Moxham*, a British ship ran into a wharf at Cadiz and injured it. There was no dispute that it was by the negligence of the master; nor any dispute that, by the law of England, the owner was liable. But the court, L. JJ. James and Mellish, and Baggallas, J. A., pointed out, with that charming simplicity of illustration so characteristic of their judiciary, that the relations of master and servant, to strangers, not involving the effect or the extent of the agency, was governed by the law of the place where the wrongful act of the servant was done, not by the law of the place of the hiring or domicile. If it were not so, there would be a double liability. For, unquestionably, the country where the wrongful act was done would decline paying any attention to the law of the place of the hiring.

No doubt, it is comity that alone compels the courts of a country to recognize rights created in another country. But it is not comity; it is an un-

warranted assumption of power to recognize a different right from the one existing by the law creating the liability, which must depend on the law of the place where the act was done, or the contract was made. Comity may decline recognizing an asserted right, because it is intrinsically unjust, as a judgment without notice, or without jurisdiction of the person, or subject, or intrinsically immoral, as polygamy, or incestuous marriages; but it has never before been suggested that comity authorized a court to create a duty that did not arise by the law of the place of the contract or conduct.—*American Law Register.*

CONTRIBUTORY NEGLIGENCE IN ILLINOIS.—Bigelow on Torts states the rule of contributory negligence in this State as follows: "The plaintiff is entitled to recover if plaintiff's negligence exceeded his own;" and cites Chicago, etc. R. R. v. Van Patten, 64 Ill. 510 and I. C. R. R. v. Baches, 55 Ill. 379, incorrectly cited as 59 Ill. Both cases cited, state the rule to be different from that stated by the author. In the Van Patten case the court below gave the rule as stated by Bigelow, but the supreme court reverse the case on that very ground, and state the rules as held in this State very clearly. The Illinois rule may be very poor law, but is entitled to be stated correctly when stated at all.

The same work, page 246, speaking of nuisance caused by obstruction of highways, says: "The mere fact that plaintiff has been turned aside by reason of the objection and caused to proceed, if at all, by a different route from that intended by him, is not special damages," even though the "plaintiff is thereby compelled to go to his land, if at all, with his team, by a longer and very circuitous road." But the American editor (Wood's ed.) to Addison on Torts, § 279, note 1, states the rule: "If a person is compelled to take a more circuitous route in consequence of the obstruction, whereby he is delayed in his journey and sustains a loss of time, has been held a sufficient special injury to uphold an action: Brown v. Watrous, 47 Me. 161; and says that Houck v. Wancher, 34 Md. 265, cited by Bigelow, is not regarded as being in accordance with the authorities in this country or England."

In this Mr. Wood is supported by Mr. Bishop in his Non-Contracts Law, § 950. The rule of Mr. Wood and Mr. Bishop seems to be the most reasonable.—*E. M. Prince in the Chicago Legal News.*

RECENT PUBLICATIONS.

A TREATISE on the Law of Estoppel and Its Application in Practice. By Melville M. Bigelow, Ph. D., Harvard. Fifth Edition. Boston: Little, Brown & Co. 1890.

This work is too well and favorably known to the profession to need any further introduction. In the present edition the cases are brought down to the time of writing, a chapter on "negligence without representation" has been added, and many additions have been made, enlarging and improving the earlier editions. It is the best work on the subject of estoppel, and reflects great credit on the learned writer. Many hundred cases are cited, and the book consists of 791 pages and an ample index.

REPORTS OF CASES Decided in The Court of Chancery, The Prerogative Court, and, on appeal, in The Court of Errors and Appeals, of the State of New Jersey. John H. Stewart, Reporter. Vol. XVIII. Trenton, N. J.: The W. S. Sharp Printing Company. 1890.

The 18th volume of Stewart's Equity Reports contains about 175 cases decided by the New Jersey Court of Chancery, the Prerogative Court and the Court of Errors and Appeals. These reports are edited with great care, and are of great convenience to the chancery solicitor. Many hundred cases are cited in the present volume.

A TREATISE ON THE LAW OF FELLOW-SERVANTS, embracing a Collection of Statutes, English and American, changing or abrogating the Common Law Rule, together with an Appendix relating to Employees' Insurance Societies. By Wm. M. McKinney, Associate Editor American and English Railroad Cases and American and English Corporation Cases. Northport, Long Island, N. Y.: Edward Thompson Company.

The law on this subject has been one of late growth and the decisions are conflicting, making it difficult for members of the profession to form any opinion. Mr. McKinney deserves the thanks of the profession for the work he has given it. He has collected all the important decisions and his text is full and complete, showing careful research. It is seldom we find a law book written with the care that has been bestowed upon this. Mr. McKinney's book is the only important work on the subject embraced therein, and we take pleasure in recommending it to the profession as one of the best written law books of this decade. There are 453 pages, followed by a very complete index. The work is handsomely bound in full law sheep.

QUERIES ANSWERED.

QUERY NO. 28.

[*To befound in Vol. 29, Cent. L. J., p. 475.*]

This query cannot be answered until a more comprehensive statement of the facts is secured. We are asked "Has T a dower interest in east eight acres?" We are in the dark as to who T is. D.

QUERY NO. 1.

[*To be found in Vol. 30, Cent. L. J. p. 16.*]

J takes title in fee-simple under a deed of bargain and sale, both by the statutes of 1865 and 1889. V.

QUERY NO. 8.

[*To be found in Vol. 30, Cent. L. J. p. 102.*]

Yes; they are first cousins within the meaning of the statute. If they go to a State where marriage between first cousins is not prohibited and are married there, the marriage is good everywhere, including States where such a marriage is prohibited by statute. C.

HUMORS OF THE LAW.

AN undoubted *alibi* was some time ago successfully proved in an American court, as follows:

"And you say that you are innocent of stealing this rooster from Mr. Jones?" queried the judge.

"Yes, sir; I am innocent—innocent as a child."

"You are confident you did not steal the rooster from Mr. Jones?"

"Yes, sir; and I can prove it."

"How can you prove it?"

"I can prove that I didn't steal Mr. Jones' rooster, judge, because I stole two hens from Mr. Graston same night, and Jones lives five miles from Granston's."

"The proof is conclusive," said the judge; "discharge the prisoner."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMIRALTY—Seamen—Wages.— Where the master of a tug is a member of the corporation that owns her and is present at the meeting of stockholders when she is put out of commission and tied up, and he does not dissent, it appears that neither he nor the other corporators expected him to be paid during the time the tug was laid up, and he cannot recover wages for such time. — *Gillingham v. Charleston Tow-Boat & Tranp. Co.*, U. S. D. C. (S. Car.), 40 Fed. Rep. 649.

2. ADMIRALTY—Jurisdiction.— The admiralty system of laws is within the exclusive control of congress, and the States have no power to legislate in regard to it.— *Welsh v. The Cambria*, U. S. D. C. (Penn.), 40 Fed. Rep. 655.

3. ADMIRALTY — Maritime Liens—Italian Vessel.— The master of an Italian ship has a lien on the vessel for his wages, which is recognized in this court.—*The Felice B.*, U. S. D. C. (N. Y.), 40 Fed. Rep. 653.

4. ADMINISTRATORS — Private Sale. — In Arkansas, a private sale of land by an administrator, upon order of the probate court, is not void when confirmed.—*Apel v. Kelsey*, Ark., 12 S. W. Rep. 703.

5. ADVERSE POSSESSION.— Possession of land in this State is presumed to be under, and in subordination to, the legal title, unless it appear that the land has been held and possessed adversely to such title for seven years before the commencement of an action to recover the same founded on the title.—*Kendrick v. Latham*, Fla., 6 South. Rep. 871.

6. ADVERSE POSSESSION. — If one by mistake inclose the land of another, and claim it as his own, to certain fixed monuments or boundaries, his actual and interrupted possession as owner for the statutory period will work a disseisin, and his title will be perfect.—*Obernalte v. Edgar*, Neb., 44 N. W. Rep. 82.

7. APPEAL—Rehearing.—On rehearing, points decided at the former hearing will not be reopened unless the subject-matter of the mistake, omission, or other cause for which the rehearing was granted, enters into and materially effects such points. — *Christy v. Burch*, Fla., 6 South. Rep. 857.

8. APPLICATION OF PAYMENT — Evidence. — Where debtor and creditor examine their respective accounts together, and agree on the balance due from the creditor on certain transactions, and to what debt such balance shall be applied, the statements made by the parties at the time of such settlement are competent evidence in a subsequent suit on such debt.—*Holcomb v. Campbell*, N. Y., 22 N. E. Rep. 1107.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS. — In an action to set aside an assignment by a partnership as in fraud of certain firm creditors, the burden is on plaintiffs to prove their allegation that a note preferred in the assignment was indorsed by one partner in the firm's name for his own private interest, without the consent of his copartners. — *Bernheimer v. Rindskopf*, N. Y., 22 N. E. Rep. 1074.

10. ATTACHMENT — Replevin. — A person whose property is wrongfully seized by a sheriff, under a writ of attachment from a county court, may maintain an action of claim and delivery against the sheriff in another county court of concurrent jurisdiction.—*Wilde v. Rawles*, Colo., 22 Pac. Rep. 897.

11. ATTORNEY'S FEES — Replevin. — Attorney's fees, though embraced in a promissory note given for rent, are not collectible by distress warrant, and the surety on a replevy bond growing out of a levy of the distress warrant is not liable for such fees. — *Jones v. Findley*, Ga., 10 S. E. Rep. 541.

12. BANKS AND BANKING—Collections.— Where checks are sent to bankers for collection, indorsed "For collection," the mere entry of the amount of the checks, before they are collected, on the books of the bankers, to the credit of the person sending them, does not pass the title to the checks or their proceeds to the bankers. —*National Butchers' & Drovers' Bank v. Hubbell*, N. Y., 22 N. E. Rep. 1031.

13. CARRIERS OF GOODS— Delivery. — Where the consignees of a cargo of malt unload part of it the day they receive notice of its arrival, but do not continue the work until the seventh day after breaking bulk, a finding that they used reasonable diligence is supported by evidence showing that a Sunday and one holiday had intervened, and that one or two of the other days had been rainy.— *Scheu v. Benedict*, N. Y., 23 N. E. Rep. 1073.

14. CARRIERS OF GOODS.—In an action for freight, for the detention of plaintiff's canal-boat, and for expenses of towage, where both parties in their pleadings allege that important provisions of the contract of transportation were not embraced in the bills of lading, it is competent for plaintiff to testify that it was orally agreed that the cargo should be unloaded alongside, and that if plaintiff's canal-boat was sent beyond a certain place defendant should pay the expense of towing it.—*Doty v. Thompson*, N. Y., 22 N. E. Rep. 1089.

15. CARRIERS—Passenger.—Where, in an action for an assault aud battery for forcibly removing plaintiff from defendant's car, the defense is that plaintiff refused to pay the additional fare required by a regulation of the company for packages too large to be carried on a passenger's lap without incommoding others, it is for the jury to determine whether two parcels, 20 by 24 inches in size, are within the purview of the regulation. —*Morris v. Atlantic Ave. R. Co.*, N. Y., 22 N. E. Rep. 1097.

16. CONSTITUTIONAL LAW— Municipal Corporations. — A county is not a "corporation for municipal purposes," within the meaning of Const. Cal. art. 11, § 6, providing that corporations for municipal purposes shall not be created by special laws. — *People v. McFadden*, Cal., 22 Pac. Rep. 851.

17. CONTRACTS — Arbitration. — The contract constituted the plaintiff's chief engineer sole umpire to decide the amount and quantity, character and kind, of work performed and materials furnished under the contract, and stipulated that his decision should be final and conclusive upon both parties: *Held*, that his decision, in the absence of fraud or such gross mistake as would imply bad faith or a failure to exercise an honest judgment, is conclusive.—*St. Paul, etc. Ry. Co. v. Bradbury*, Minn., 44 N. W. Rep. 1.

18. CORPORATIONS— Capital Stock. — Civil Code Cal. § 309, prohibiting the directors of a corporation from creating debts "beyond their subscribed capital stock,"

under penalty of being individually liable therefor, applies to all the subscribed capital stock, whether paid in or not, and regardless of the disposition made of it; and the debts do not include capital stock paid for corporate property. — *Moore v. Lent*, Cal., 22 Pac. Rep. 875.

19. CORPORATIONS — Directors. — Directors of a corporation are personally liable if they suffer the corporate funds of property to be wasted or lost by gross negligence and inattention to the duties of their trust; and an action at law may be maintained against them jointly and severally for the amount of such losses.— *Horn Silver Mining Co. v. Ryan*, Minn., 44 N. W. Rep. 56.

20. COVENANT OF WARRANTY. — A judgment against a covenantee in possession, upon foreclosure of a lien created prior to the covenant, rendered after notice to the warrantor to appear and defend, is conclusive of the existence of an outstanding paramount incumbrance. It is a constructive eviction, and entitled him to bring his action on the covenant. — *Collier v. Cowger*, Ark., 12 S. W. Rep. 702.

21. CRIMINAL LAW—Homicide.— Where, on a trial for murder, the evidence establishes conclusively and solely that the killing was assassination of deceased, at night, by his fireside, by some one, who fired through a crack from without, it is not error for the court to confine its charge to the law applicable to murder in the first degree.—*Jones v. State*, Ark., 12 S. W. Rep. 704.

22. CRIMINAL LAW—Burglary— Possession. — To warrant an inference of guilt from the fact that some of the stolen property was found in defendant's possession recently after a burglary, his possession must be personal and exclusive, must be unexplained, and must involve a distinct and conscious assertion of property by defendant.—*Jackson v. State*, Tex., 12 S. W. Rep. 701.

23. CRIMINAL LAW—Good Character.— It is proper to charge the jury that "evidence as to good character can have little practical effect against direct and satisfactory evidence as to guilt, and it cannot turn the scale against conclusive evidence." — *State v. Spooner*, La., 6 South. Rep. 879.

24. CRIMINAL PRACTICE — Arraignment and Plea. — Where one is arraigned and offered an opportunity to plead, but does so only through his attorney, no error can be predicated of the court's ordering the plea of not guilty to be entered; it being the duty of the court so to do where the prisoner stands mute, under Pen. Code Cal. § 1024.—*People v. Bowman*, Cal., 22 Pac. Rep. 917.

25. DEDICATION—Acceptance. —A deed given by defendant to a third person, wherein the description recites that the boundary lines of the property conveyed were to run "to and along Twelfth street," which was then an open public street to the east of, but not extended westerly through, defendant's property, constitutes a dedication of, or an offer by defendant to dedicate, land for the purpose of a street. — *City of Eureka v. Armstrong*, Cal., 22 Pac. Rep. 928.

26. DEEDS— Parol Evidence. — Parol evidence is admissible to show that Eugene J. Gannon, the grantor in a deed, was the person described as "Joseph E. Gannon" in a devise of the land, and that the grantee described as "Michael J. Gannon, his wife," was not the wife of the grantor, but his brother, to whom was devised an undivided interest in the land.— *Skinker v. Haagsma*, Mo., 12 S. W. Rep. 659.

27. DEEDS—Evidence.— A deed purporting to convey all of defendant's "right, title, and interest" in certain premises is not admissible in evidence to show compliance with an agreement by defendant to execute to plaintiff "a good and sufficient deed of bargain and sale of said property, free and clear of all incumbrances," and it is immaterial that the trial is by the court without a jury.—*Rogers v. Borchard*, Cal., 22 Pac. Rep. 907.

28. DEEDS—Evidence. — A deed executed by an attorney in fact is admissible in trespass to try title, though the authority of the attorney is not shown, where it is the common source of title, under which both parties claim. — *Glover v. Thomas*, Tex., 12 S. W. Rep. 684.

29. DIVORCE—Alimony—Appeal.—It being within the power of the circuit court, under Rev. Mo. 1879, § 2179, to decree alimony *pendente lite*, the court of appeals, on appeal, may determine the time during which such order shall require payment to be made, and direct all arrears to be paid before entry of judgment in favor of the payor, though no exceptions were to such order.— *State v. Rombauer*, Mo., 12 S. W. Rep. 661.

30. EJECTMENT — Res Adjudicata.— In an action of ejectment to recover the possession of real estate, all occupants of the premises must be made defendants, to be concluded by the judgment, unless some of such occupants are so in privity with one or more co-defendants that a judgment against such co-defendant will be conclusive upon them.—*Tarkington v. Link*, Neb., 44 N. W. Rep. 35.

31. ELECTION CONTESTS— Quo Warranto. — In a proceeding on *quo warranto* against one holding a public elective office, an answer which shows that the defendant received a majority of the votes cast at election is good on demurrer as against the relator's claim to the office, and also against the State, in so far as its right to judgment depends on the relator's election.—*State Law v. Saxon*, Fla., 6 South. Rep. 858.

32. ELECTIONS—Contest—Injunction.—Where, in a contest of election, the contestant has been adjudged entitled to the office contested, a court of equity has no authority to enjoin him from taking possession of the office, and an appeal from an order dissolving the temporary injunction will not lie.—*State v. Mayor*, Neb., 44 N. W. Rep 90.

33. EMINENT DOMAIN — Compensation. — Where witnesses are shown to be familiar with the value of a particular piece of land across which a railroad has been built they are competent to testify as to the value of such tract of land immediately before the location of the road, and to the value thereof immediately afterwards.—*Burlington, etc. R. Co. v. White*, Neb., 44 N. W. Rep. 95.

34. EMINENT DOMAIN — Compensation.— In assessing damages for right of way for a railway, it is proper to consider the manner in which the road cuts the land, the excavations and embankments, and the exposure of the property to particular injuries from the proximity of the road which may result from its proper construction and operation.—*Fremont, etc. R. Co. v. Meeker*, Neb., 44 N. W. 79.

35. EMINENT DOMAIN— Municipal Corporations.—It is not essential to the validity of statutory provisions for the condemnation of property for public use, or for the assessment of damages and benefits from public improvements, that the land owner have notice of the action of the proper authorities in determining what property shall be taken or what property may be benefited by such improvements.—*State v. District Court*, Minn., 44 N. W. Rep. 59.

36. EVIDENCE— Character.— It is improper, even on cross-examination, to ask question eliciting the witness' knowledge of the conduct or particular acts of the person whose character is in issue. — *Moulton v. State*, Ala., 6 South. Rep. 758.

37. EVIDENCE — Land-office Records.— Official registers kept by public officers, and in which they enter their official transactions, as a convenient and appropriate mode of properly discharging the duties of their offices, are admissible in evidence, although there is no statute expressly authorizing or requiring such registers to be kept.—*Bill v. Kendrick*, Fla., 6 South. Rep. 868.

38. EVIDENCE—Parol.—In an action against a city for damages to property resulting from the construction of a bridge, defendant offered in evidence a written agreement, giving the city a certain number of feet of land in consideration of the widening, extending, and grading of the street on which the bridge was built, and agreeing that the street grade might be made "by excavating and filling in," etc.: *Held*, that the words,

"grading, excavating, and filling," were ambiguous, and defendant was entitle to show the meaning of the words.—*City of Atlanta v. Schmeltzer*, Ga., 10 S. E. Rep. 543.

39. EXECUTION—Judgment.—A judgment for the recovery of money is, by our statute, subject to levy under execution.—*Henry v. Traynor*, Minn., 44 N. W. Rep. 11.

40. EXECUTORS—Accounting.—Under Code Civil Proc. N. Y. 2472, which gives the surrogate power to control executors, settle their accounts, and enforce the payment of debts and legacies, a surrogate has no jurisdiction, in settling the accounts of an executor, to order a legatee to repay to the executor money which has been paid him in excess of his just share.—*In re Underhill*, N. Y., 22 N. E. Rep. 1120.

41. EXPERT TESTIMONY—Negligence.—The opinion of physicians who attended plaintiff, founded on personal examination of his condition, which was described, or on an hypothetical question excluding all causes up to the time of the accident, that the accident caused his condition, and that certain physical consequences would result therefrom, were admissible in evidence, and were not speculative.— *McClain v. Brooklyn City Ry. Co.*, N. Y., 22 N. E. Rep. 1063.

42. FACTORS AND BROKERS— Contracts.— Defendants agreed to sell stock for plaintiffs, and pay over to them five dollars a share, and half the profits accruing to defendants, "personally," on it, less expenses and commissions. Defendant agreed to give R half their interest to sell the stock. R employed a broker, who sold it at an advance: *Held*, that on an accounting the expenses and commission of the broker should be allowed to defendants, but not the expenses or commissions of R, as he was the assignee of defendants, and half the profits must come to them before they could settle with R.—*Berdell v. Allen*, N. Y., 22 N. E. Rep. 1099.

43. FACTORS AND BROKERS— Commissions.— Defendant wrote to P & Co., stating that it wished to dispose of its ore to them. P & Co. referred it to plaintiff as one who knew their business methods. Plaintiff had made hundreds of transactions for them. P & Co. desired only to smelt the ore for defendant, but defendant, would not make a smelting contract unless P & Co. would also buy the the ore. Plaintiff was to receive a commission from P & Co. for making a smelting contract. He showed P & Co. the advisability of buying the ore, and suggested ways in which they could get at the lowest figure. The entire transaction between defendant and P & Co. was embraced in one contract drawn by plaintiff: *Held*, that he was not defendant's agent in negotiating the sale, so as to entitle him to commissions from it.—*Harnickell v. Parrot Silver & Copper Min. Co.*, N. Y., 22 Rep. 1079.

44. FEDERAL COURTS—Jurisdiction.—Under the act of congress providing that, when an action is between citizens of different States, it may be brought "in the district of the residence of the plaintiff or defendant," an action by a non-resident against a partnership, whose members are residents of different States and districts, may be brought in the district of the residence of one of them.—*Rawitzer v. Wyatt*, U. S. C. C. (Cal.), 40 Fed. Rep. 609.

45. FRAUDS—Statute of.—In an action for goods sold and delivered and money advanced where the evidence shows that the goods were delivered and the money advanced to another, the defendant cannot be held as an original contractor, he being at most but a guarantor.—*Harris v. Frank*, Cal., 22 Pac. Rep. 856.

46. GIFTS—Inter Vivos.—A donor 70 years of age, and who had suffered two strokes paralysis, executed an instrument in the form of a bill of sale of his life insurance policy to his niece, and delivered the paper to his attorney, telling him to give it to her, in case anything happened to him. In about six weeks he died from a third stroke of paralysis, and the paper was delivered according to instructions: *Held*, that there was no gift *inter vivos* as the doner had not relinquished control of his property.—*Williams v. Guile*, N. Y., 22 N. E. Rep. 1071.

47. HOMESTEAD.—Under Laws 1876, ch. 37, a surviving husband or wife was entitled to an unconditional life-estate in the homestead premises. It was not qualified by, or so subject to, a distinct or independent right of occupancy by the minor children. — *McCarthy v. Van Der Mey*, Minn., 44 N. W. Rep. 53.

48. HUSBAND AND WIFE—Separation.—A contract between husband and wife, executed after separation, through the medium of a trustee, whereby the husband agrees to pay the trustee, during the wife's life, a certain amount each month for her support, and the wife and trustee agree to save the husband harmless from any further liability for her support is valid.— *Galusha v. Galusha*, N. Y., 22 N. E. Rep. 1114.

49. HUSBAND AND WIFE—Separation —Articles of separation whereby husband and wife agree to live separately from the execution thereof, and whereby the husband agrees to pay money annually to a trustee for the support of his wife and children during the period of her natural life, unless she should remarry, are valid. —*Clark v. Foster*, N. Y., 22 N. E. Rep. 1111.

50. INSURANCE—Suicide.—The fact that assured committed suicide in N. Y. is not a defense to the action, under the provision of the policy that it should be void if he should "die in violation of, or attempt to violate, any criminal law" of the State in which he should be, as in N. Y. suicide is not a crime, though an attempt to commit suicide is a crime.—*Darrow v. Family Fund Soc.*, N. Y., 22 N. E. Rep. 1095.

51. JUDGMENT—Limitation.—Code Civil Proc. Kan. § 445, providing that "if executing shall not be sued out within five years from the date of any judgment" the judgment shall become dormant, applies to judgments, against towns, as *mandamus* is equivalent to execution. —*Brockway v. Township of Oswego*, U. S. C. C. (Kan.), 40 Fed. Rep. 612.

52. JUDGMENT— Presumption. — The presumption of jurisdiction supporting the judgment of a court of general jurisdiction is not overcome merely by the absence from the judgment roll of the evidence showing that jurisdiction had been acquired.— *Nye v. Swan*, Minn., 44 N. W. Rep. 9.

53. LEASES—Assignment.—A tenant for the life of another assigned his lease after its termination, neither party knowing that the lease had expired. The assignee took possession, and obtained a new lease from the reversioner: *Held*, that the original lessee could not compel an assignment to him of the second lease to secure the unpaid consideration of his assignment; the relation between him and his assignee being merely that of vendor and vendee.—*Hibbard v. Remsdell*, N. Y., 22 N. E. Rep. 1123.

54. LIBEL — Excessive Damages. — Pratt v. Pioneer Press Co., 32 Minn. 217, and 20 N. W. Rep. 87, followed, as to the power of the trial court to set aside, as excessive, an award of damages for libel, and declaring the rule to be regarded in reviewing such an order.—*Dennis v. Johnson*, Minn., 44 N. W. Rep. 68.

55. MASTER AND SERVANT—Contributory Negligence.—In an action by a brakeman against a railroad for personal injuries received by being struck by a bridg while standing on the roof of a freight car, while engaged in his work, it appeared from plaintiff's evidence the bridge was too low for him to pass under it while standing upright; that he was familiar with the bridge, and was standing with his back to the engine, when he knew that the train was about to pass under the bridge. *Held*, that the plaintiff's testimony showed contributory negligence.—*Williams v. Delaware, etc. R. Co.*, N. Y., 22 N. E. Rep. 1117.

56. MECHANICS' LIENS — Material-Men. — Code Civil Proc. Cal. § 1183, providing liens for contractors, laborers, and material-men, requires the construction contract, where the amount exceeds $1,000, to be in writing, and to be filed in the recorder's office of the county where the property is situated; otherwise it

shall be void; "and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof:" *Held*, that, as the contract is void when not recorded, the materialmen are entitled to a lien without regard to the amount due on such contract.— *Davies-Henderson Lumber Co. v. Gottschalk*, Cal., 22 Pac. Rep. 860.

57. MECHANICS' LIENS—The interest of one who, being in possession of land under a contract of purchase, erects a building thereon, is chargeable with a lien in favor of a material-man or laborer. — *King v. Smith*, Minn., 44 N. W. Rep. 65.

58. MECHANICS' LIENS — Railroad Companies.— Lumber, posts, building paper, and lath sold by dealers in lumber to a said contractor engaged in building a railroad, and delivered to him to be used in the erection of shanty boarding-houses or stables on or near the line of the railroad, for the use of the men and animals employed and used by such subcontractor in and upon such work: *Held*, to be materials furnished in the construction of the railroad, within the intent and meaning of the statute. — *Stewart-Chute Lumber Co. v. Missouri Pac. Lumber Co.*, Neb., 44 N. W. Rep. 48.

59. MECHANICS' LIENS — "Lot of Land." — The term "lot of land," as used in the mechanics' lien law (Gen. St. 1878, ch. 90, § 1), is not limited to the particular city, town, or village lot upon which the building is erected, as bounded and described on the plat, but denotes one single parcel lying in a body, known and treated by usage or the contract of the parties as one tract. Hence, where the owner of two contiguous town lots contracts by one entire contract for the erection of a row of houses upon them, the parties will be deemed to have connected and treated the whole as one tract. — *Lax v. Peterson*, Minn., 44 N. W. Rep. 3.

60. MUNICIPAL CORPORATIONS — Eminent Domain. — Under the provision of the charter of St. Louis (2 Rev. St. Mo. p. 1607), that if the ownership of property condemned be in controversy the damages shall be paid into court for the use of the successful claimant, the city, where suit has been begun by one claimant, may pay the damages into court and file an answer in the nature of a bill of interpleader, bringing in all the rival claimants.— *Hilton v. City of St. Louis*, Mo., 12 S. W. Rep. 657.

61. MUNICIPAL CORPORATION — Defective Street. — A city is liable for negligently maintaining an obstruction in a street, whether created by a public or private agency.—*Pettengill v. City of Yorker*, N. Y., 22 N. E. Rep. 1056.

62. MUNICIPAL CORPORATIONS— Defective Streets. — A municipal corporation is not liable, in the absence of an express statutory provision imposing a liability, for personal injuries caused by its negligence in leaving a street out of repair, and there is no distinction between cases arising under charters making it the duty of the city, as such, to keep streets in repair, and those making it the duty of the city council to do so.— *Arnold v. City of San Jose*, Cal., 22 Pac. Rep. 877.

63. MUNICIPAL CORPORATIONS— Defective Streets.— In the absence of an express statute imposing the duty and declaring the liability, municipal corporations, having the powers ordinarily conferred upon them respecting bridges, streets, and sidewalks within their limits, owe to the public the duty to keep them in a safe condition for use, in the usual mode, by travelers, and are liable in a civil action for special injuries resulting from neglect to perform this duty.—*Cline v. Crescent City R. Co.*, La., 6 South. Rep. 851.

64. MUNICIPAL CORPORATION—Franchises. — The city of New Orleans, by delegated power from the legislature, has the paramount control and regulation of the streets of the city, and can grant the use of a street railway already constructed to another, which she has authorized to be operated.— *Canal, etc. R. Co. v. Crescent City R. Co.*, La., 6 South. Rep. 849.

65. MUNICIPAL JUDGE—Powers. — In the examination upon a complaint to learn if a crime has been committed, and, if so, who probably committed it, a magistrate exercises the powers and performs the duties of a judicial officer.—*State v. Keyes*, Wis., 44 N. W. Rep. 13.

66. MUTUAL BENEFIT INSURANCE—Beneficiaries. — The word "representatives" as used in the by laws is to be construed, not in any limited or technical sense, but as meaning and including any person whom the member may designate, or, if he fail to designate, the person whom the by-laws designate, as the person to whom the money shall be paid.— *Walter v. Odd-Fellows' Mut. Ben. Soc.*, Minn., 44 N. W. Rep. 57.

67. MUTUAL BENEFIT SOCIETY—Insurance. — Evidence held sufficient to sustain finding that decedent was a member in good standing."— *Willard v. Supreme Council*, Cal., 22 Pac. Rep. 864.

68. NEGLIGENCE—Highways. — Where a contractor, in violation of a city ordinance, leaves a hole unguarded by light or barriers in a public street which he is repairing, he is responsible to one injured thereby without contributory negligence. A street is none the less a highway because the duty of keeping half of it in repair is imposed on some one other than the public. — *Barton v. McDonald*, Cal., 22 Pac. Rep. 855.

69. NEGLIGENCE—Defective Highways.—The fact that a road has been used for public travel many years, and has been recognized and treated by the town authorities as a highway, gives it that character, so far as respects the liability of the town to a traveler for injuries caused by the negligence of the highway commissioners in failing to keep it in proper condition. — *Ivory v. Town of Deer Park*, N. Y., 22 N. E. Rep. 1080.

70. NEGLIGENCE.—In an action for personal injuries the complaint alleged that plaintiff, without fault or negligence on her part, was injured by falling into a trench, dug under a permit from the city, and negligently left unguarded by defendant's servants. Plaintiff testified that she saw the trench almost daily, and had passed over it shortly before the accident, and that when it happened her attention had been diverted from the trench: *Held*, that it was error to instruct that plaintiff's negligence was not in the case, and would be no defence.—*Kelly v. Doody*, N. Y., 22 N. E. Rep. 1084.

71. NEGOTIABLE INSTRUMENT. — A promissory note payable "on demand after date" is due at once, without an actual demand and the statute of limitations begins to run against it immediately. — *O'Neil v. Magner*, Cal., 22 Pac. Rep. 876.

72. PARTNERSHIP.—Where, in the sale of chattels, the selling firm and the buying firm have a common member, who sells the property as his own in payment of his pre-existing debt, his copartners in each firm being ignorant of his connection with the other, the proper accounting between the two firms, on equitable principles, is to leave the transaction to stand as to such common member's interest in the property, but for the latter firm to account to the other members of the former for their interest in the same. — *Gray v. Church*, Ga., 10 S. E. Rep. 539.

73. PARTNERSHIP—Survivor. — The insolvent survivor of an insolvent firm can make a valid general preferential assignment of the property which belonged to the firm for the benefit of its creditors, and it is no ground of objection that the assignment includes his own individual property.—*Haynes v. Brooks*, N. Y., 22 N. Rep. 1083.

74. PLEADING—Issues. — Where there is an issuable plea of new matter, though inartificially drawn, and the plaintiff, who is at the time in default in pleading goes to trial in the absence of the defendant, without joining issue on the plea, the judgment may be reversed on writ of error.—*Gunning v. Heron*, Fla., 6 South. Rep. 855.

75. PLEDGE—Duty of Pledgee to Sell.—In the case of a pledge, in the absence of an express contract making it the duty of the pledgee to sell the property within a specified time, the duty of the pledgee is to exercise

ordinary care, and he is liable only for neglect of such care. The pledgor cannot make it the duty of the pledgee to sell merely by requesting or directing him so to do after the contract of pledging has been made. —*Minneapolis, etc. Co. v. Belcher*, Minn., 44 N. W. Rep. 5.

76. PRESUMPTION—Fact. — Instruction that "when a fact is once shown to exist the law presumes it to continue until the contrary is shown" is error, as it is presumed to continue only "as long as [is usual with things of that nature."— *Scott v. Wood*, Cal., 22 Pac. Rep. 871.

77. PRINCIPAL AND AGENT — Power of Attorney. — A power of attorney authorized the agent, among other things, "to exchange [the principal's] old issues or certificates of stock, and to receive new issues or certificates in lieu thereof;" but it nowhere gave any authority to sell or mortgage the principal's property. It concluded with the general words: "And, generally, to manage and control to my best interest and advantage, all my property, and to transact all business which may be requisite or proper to effectuate all or any of the premises," etc.: *Held*, that this created a special agency, and did not authorize a corporation, on the presentation of a certificate of stock indorsed by the agent, to cancel it, and issue a new one in the name of a third person.—*Quay v. Presidio, etc, R. Co.*, Cal., 22 Pac. Rep. 925.

78. PUBLIC LANDS—Ejectment.—The title which vests under the congressional grant, and the performance of the prescribed conditions, is a legal title, upon which an action of ejectment may be maintained before the patent issues.—*Francoeur v. Newhouse*, U. S. C. C. (Cal.), 40 Fed. Rep. 618.

79. PUBLIC LANDS—Surveys.—Jurisdiction, for surveying purposes, over land which is not within any county, but which was included in the land district of a county that has become disorganized, is conferred by an act attaching the disorganized county to an adjoining county for "judicial and other purposes." —*Kinmarle v. Houston, etc. Ry. Co.*, Tex., 12 S. W. Rep. 698.

80. PUBLIC POLICY— Contracts. — A contract between two railroad companies, by which one of them, in consideration of contingent compensation, among other things a part of the grant, agrees to refrain from applying to the legislature for a land grant, and to assist the other in getting it, is void, as against public policy, though it stipulate that the means to be used in securing the grant shall be reasonable and proper.—*Chippewa Valley, etc. Ry. Co. v. Chicago, etc. Ry. Co.*, Wis., 44 N. W. Rep. 17.

81. QUIETING TITLE—Adverse Possession. — Where a purchaser of land, believing he has a good title, tells one who is in possession that he has bought the land, and demands possession, which is given without protest, and he thereafter continues in peaceable possession for more than five years, such possession is adverse, and he thereby acquires a title which he may have quieted in an action against the party in possession at the time of his purchase. — *McCormack v. Silsby*, Cal., 22 Pac. Rep. 874.

82. RAILROAD COMPANIES—Stock-killing Cases.—In an action against a railroad company for the killing of a cow, a complaint which avers that the engine was "so negligently operated by defendant's agents that plaintiff's cow was killed," and that "said cow was killed on account of said negligence," is sufficiently explicit in alleging that the damage to the animal resulted from the negligence of defendant's agents. — *Western Ry. v. Lazarus*, Ala., 6 South. Rep. 877.

83. RAILROAD COMPANY — Eminent Domain. — In a conveyance of land bounded by a public road or street, the grantee ordinarily takes a legal title to the center thereof, subject to the rights of the public therein; but he does not thereby secure such a title to the land embraced in the road or street as will enable him to claim compensation from a railway corporation which locates and operates its road thereon, under an appropriation of the same authorized by §§ 3242, 3243, tit. 2, ch. 32, Hill, Code Or., or by any similar statute. — *McQuaid v. Portland, etc. Ry. Co.*, Oreg., 22 Pac. Rep. 899.

84. RAILROAD COMPANIES — Taxation. — Lands embraced in a railroad land grant, and exempt from ordinary taxation while held by the corporation for whose benefit the grant was made: *Held*, to have become subject to taxation, the entire beneficial interest of the corporation having been conveyed by a trust-deed, to secure a specified charge upon the lands exceeding their value, and the *cestuis que trustent* being empowered, at their mere election, to take and appropriate the entire property in satisfaction of their claims upon it, and so as to leave nothing to revert to the grantor. — *In re St. Paul, etc. R. Co.*, Minn., 44 N. W. Rep. 71.

85. RAILROAD COMPANIES— Taxation. — The Lafayette Hotel, owned by a railroad corporation, and kept by its lessee as a hotel and place of summer resort: *Held*, not included within the exemption from ordinary taxation enjoyed by the corporation in respect to such of its property as is held and used for railroad purposes. — *State v. St. Paul, etc. Ry. Co.*, Minn., 44 N. W. Rep. 63.

86. RAILROAD COMPANIES—Crossings. — Upon the laying out of a public highway across the track and right of way of a railroad company, the latter is not entitled to compensation for providing and maintaining cattle-guards and signboard at the new crossing.—*State v. District Court*, Minn., 44 N. W. Rep. 7.

87. RAILROAD COMPANIES—Taxation.—Immunity from taxation is not a corporate franchise or "right and privilege," within the meaning of the Texas statute authorizing proceedings by *quo warranto* "in case any person shall usurp or unlawfully hold any office or franchise, or any incorportion does or omits any act which amounts to a surrender of forfeiture of its rights and privileges as a corporation;" and an appeal from a decree withdrawing such exemption, in such a proceeding seeking forfeiture of charter and such withdrawal, need not be prosecuted within the time required in *quo warranto* proceedings.—*International, etc. Ry. Co. v. State*, Tex., 12 S. W. Rep. 685.

88. RAILROAD COMPANIES— Consolidation. — The fact that a railroad company, empowered by its charter "to join stock or consolidate with any other railway company running in the same general direction," is forbidden to "rent, sell, lease, or consolidate with any parallel or competing railroad," does not impliedly authorize it to sell its road and franchises to a company whose road, though not a parallel or competing line, does not run in the same general direction. — *East Line, etc. R. Co. v. State*, Tex., 12 S. W. Rep. 690.

89. RAILROAD COMPANIES—Negligence. — Where two railroads have a traffic interchange of cars, if one sets loaded cars on the track of the other at an unusual time of the night, and does not give notice, or put out danger signals of warning, whereby an employee of the other is killed by collision with the obstruction, it is liable in damages for the negligence.— *Lockhart v. Little Rock, etc. R. Co.*, U. S. C. C. (Tenn.), 40 Fed. Rep. 631.

90. REAL ESTATE AGENT—Commissions.—A real estate agent was employed by one B to effect an exchange of certain real estate with one C. He succeeded in making a contract between the parties for the exchange of said parcels of land, and C complied with the contract on his part, but B, apparently without just cause, refused to comply: *Held*, that the agent was entitled to his commission. — *Greenwood v. Burton*, Neb., 44 N. W. Rep. 28.

91. RECEIVERS—Contempt. — A receiver appointed in an attachment suit begun in the common pleas and transferred to the circuit court of another county, becomes an officer of the latter court, and for disobedience to its orders to account, is liable to be punished by it for contempt.—*In re Haley*, Mo., 12 S. W. Rep. 667.

92. REMOVAL OF CAUSES—Citizenship. — Where a suit is brought against a corporation in the courts of this State, and an affidavit for removal alleges that the corporation is a citizen of another State, it is insufficient

in not stating that the corporation is not domiciled in the State of Louisiana.—*Guinault v. Louisville, etc. R. Co.*, La , 6 South. Rep. 850.

93. SALE—Fraud.—In replevin against a sheriff who has seized the goods under attachment against plaintiff's vendor, where the question in issue is as to the good faith of the sale by which the plaintiff obtained title, it is proper to refuse to instruct the jury that if, as part of the agreement on which the bill of sale was made, a sum of money was given by the plaintiff to his vendor for the latter's personal use, then the conveyance is fraudulent. — *Spiegel v. Hays*, N. Y., 22 N. E. Rep. 1105.

94. SPECIFIC PERFORMANCE—Decree.— A vendor sold the timber on certain lands, payments to be made yearly, the vendees to be entitled to remove the proportion of the timber paid for, but until such payment the title was to remain in the vendor, time to be of the essence of the contract: *Held*, in a suit by the vendor, asking for specific performance by a day fixed, or in default thereof that a forfeiture be decreed against the vendees, or that the court order a sale as under a mortgage foreclosure, the summons reciting that no personal decree is sought, that a decree *pro confesso*, that the vendees pay the amount due under the contract by a time certain, or all their rights be at an end, except the right to cut the timber already paid for, is not error of which they can complain. —*Michigan Land & Iron Co. v. Doherty*, Mich., 43 N. W. Rep. 988.

95. TAXATION—Assessment.— An assessment is not invalidated by the fact that the property was added by the assessor to the inventory of the tax-payer's estate at the direction of the board of equalization. — *Ferris v. Kemble*, Tex., 12 S. W. Rep. 689.

96. TAXATION — Telegraph Company. — The city of Philadelphia is not authorized to tax a telegraph company occupying its streets, and could not, even if authorized, tax a company engaged in interstate commerce.—*City of Philadelphia v. Western Union Tel. Co.*, U. S. C. C. (Penn.), 40 Fed. Rep. 615.

97. TAX-LIENS — Adverse Possession. — Under the revenue law of 1879, a person who has been in the open, exclusive, notorious, adverse possession of real estate for ten years, thereby acquires an absolute title free from the liens of any taxes which existed on said property prior to the commencement of said period of ten years.—*D'Gette v. Sheldon*, Neb., 44 N. W. Rep. 30.

98. TENDER—Interest. — There being conflicting evidence as to whether tender of the purchase price was made at the proper time, the allowance of interest to the vendors to the time of the trial should not be disturbed, especially where the vendees have been in possession, and had the use of the property.— *Brandt v. Clark*, Cal., 22 Pac. Rep. 863.

99. TRIAL—Verdict—Correction. — It is no cause for setting aside the verdict of a jury that when agreed upon it is written and sealed, and the jury separate, by agreement of the parties, if afterwards they come into court and report the sealed verdict.—*Rogers v. Sample*, Neb., 44 N. W. Rep. 86.

100. TRIAL—Verdict—Remittitur.—A motion by defendants for a new trial because of an excessive verdict was granted, unless plaintiff elected to remit a certain sum, and defendants would accept it as modified. Defendants refused to accept the offer, and the motion was denied; the order reciting that the verdict was sustained by a preponderance of evidence, "unless as to the amount of the verdict." *Held*, that as the language of the trial judge clearly showed his belief that the verdict was excessive, which belief was warranted by the evidence, the defendants were entitled to have the verdict reduced without the imposition of terms, and that a new trial should be granted.—*Gardner v. Tatum*, Cal., 22 Pac. Rep. 885.

101. USURY.—In an action upon three promissory notes, the defense was usury: *Held*, that if M S acted as the agent of the borrowers in procuring the loan, the bonus received by him would not taint the transaction with usury.—*Davis v. Sloman*, Neb., 44 N. W. Rep. 41.

102. VENDOR AND VENDEE— Description.—Defendant owned but one tract of land in a subdivision of the city of O. This tract was referred to in the correspondence which constituted the contract, but without a definite description. This was held to be sufficient to admit parol evidence as to description.—*Adams v. Thompson*, Neb., 44 N. W. Rep. 74.

103. VENDOR AND VENDEE—Assumption of Mortgage. —Where land owner sells real estate upon which he has given a mortgage, and the purchaser, as part of the consideration, assumes the mortgage debt, and agrees to pay the same, the mortgagee, after the debt becomes due, may bring an action against the purchaser, and recover the amount due thereon.—*Keedley v. Flack*, 44 N. W. Rep. 34.

104. WATER AND WATER-COURSES— "Haven" or "Harbor."—A body of water need not be land-locked in order to be a "haven" or "harbor."—*Board of Trustees v. Lowndes*, U. S. C. C. (N. Y.), 40 Fed. Rep. 625.

105. WILL—Testamentary Capacity.—Upon an issue of testamentary capacity, where the testator, who had previously been of sound disposing mind and memory, was suddenly prostrated with severe and fatal illness, during which he executed a codicil to his will, is competent for the proponent to prove that a short time before he was taken sick the testator had expressed his intention to make such changes in his will as he did make by his codicil.—*Hammoned v. Dike*, Minn., 44 N. W. Rep. 61.

106. WILLS—Devisees.—Where testator has conferred upon his executors the power to sell land which he has devised, with the provision that the fund so arising shall be invested, and the principal and income applied by them for the use and benefit of the same persons to whom the land had been specifically devised, the court cannot treat the proceeds of a sale made under the power as legal assets in the hands of the executors, and apply them to the payment of testator's debts.—*In re McComb*, N. Y., 22 N. E. Rep. 1070.

107. WILLS—Devise.—Under Civil Code Cal. § 1307, providing that, when a testator dies leaving children unprovided for by his will, it not appearing that such omission was intentional, they shall take as if he had died intestate, a widow to whom her husband devised all his property, without mention of his children, takes only as a tenant in common with the children.—*In re Grider's Estate*, Cal., 22. Pac. Rep. 908.

108. WILLS—Proof of—Lost Will.—Under Gen. St. Colo. ch. 114, § 21, which provides that a lost or destroyed will may be admitted to probate when its execution is established, and the contents thereof "shown by the testimony of two or more witnesses," the will, as an entirety, must be established by the united testimony of at least two witnesses, to each and every part.—*Todd v. Rennick*, Colo., 22 Pac. Rep. 898.

109. WITNESS—Husband and Wife.—In an action to enjoin the enforcement of a deed of trust securing upon the wife's land certain notes given by the husband in a transaction induced by fraud, the husband and wife may testify as to conversations between themselves as to the transaction, as a part of the *res gestæ*, and also on the ground of fraud.—*Henery v. Sneed*, Mo., 12 S. W. Rep. 663.

110. WITNESS — Physicians. — Code Civil Proc. N. Y. § 834, provides that a physician or surgeon shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. Section 836 provides that said section applies to every examination of a person as a witness, unless the provision thereof is expressly waived by the patient: *Held*, that such provision is waived where the patient's attorney calls the physician as a witness, and states that as his attorney he waives the privilege. — *Alberti v. N. Y., etc. R. Co.*, N. Y., 23 N. E. Rep. 35.